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No. 00-____

IN THE
SUPREME COURT OF THE UNITED STATES

GENERAL COMMUNICATION, INC.,

Petitioner,

v.

IOWA UTILITIES BOARD, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission reasonably interpreted 47 U.S.C. § 251(f) in promulgating 47 C.F.R. § 51.405's requirement that rural and small local exchange companies bear the burden of proof to establish their entitlement to exemptions from, as well as suspensions and modifications of, affirmative obligations imposed upon them by the Telecommunications Act of 1996.

2. Whether the Federal Communications Commission reasonably implemented 47 U.S.C. § 251(c) and (d) of the Telecommunications Act of 1996 by directing state commissions to continue the exemption of local exchange carriers from the Act's requirements only upon a showing that the requirements would "be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry."

3. Whether the Eighth Circuit's invalidation of 47 C.F.R. § 51.405 is inconsistent with the administrative law doctrine of "fair notice."

LIST OF PARTIES

In addition to Petitioner General Communication, Inc., the following entities were parties in the court below and are respondents to this petition:

Ad Hoc Telecommunications Users Committee
Airtouch Communications, Inc.
Alabama Public Service Commission
American Communications Services, Inc.
Ameritech Corporation
Anaheim, California Public Utilities Department
AT&T Corporation
Cincinnati Bell Telephone Company
Citizens Telephone Company of Kecksberg
Comcast Corporation
Concord Telephone Company
Consumers' Utility Counsel Division, Governor's Office of Consumer Affairs
Department of Public Utilities of the Commonwealth of Massachusetts
Excel Telecommunications, Inc.
Federal Communications Commission
GST Telecom, Inc.
ICG Telecom Group, Inc.
Information Technology Industry Council
Iowa Utilities Board
Jones Intercable, Inc.
Kansas Corporation Commission
Kentucky Public Service Commission
KMC Telecom, Inc.
Maryland Public Service Commission
MCI Telecommunications Corporation
Mid-Sized Incumbent Local Exchange Carriers
Mississippi Public Service Commission
National Cable Television Association
National Rural Telecom Association

National Telephone Cooperative Association
New York State Department of Public Service
North Carolina Utilities Company
North State Telephone Company
Oregon Public Utility Commission
Organization for the Promotion and Advancement of Small Telecommunications Companies
Pennsylvania Public Utility Commission
People of the State of California & PUC of California
Public Utilities Commission of the State of Colorado
Public Service Commission of Wisconsin
Public Service Commission of the State of Montana
Qwest Communications
Rock Hill Telephone Company
Roseville Telephone Company
Rural Telecommunications Group
Rural Telephone Coalition
South Dakota Public Utilities Commission
Sprint Communications Company
Sprint Corporation
Sprint PCS
Sprint Spectrum, L.P.
State of Texas
Telecommunications Resellers Association
Texas Office of Public Utility Counsel
The Ad Hoc Coalition of Telecommunications Manufacturing Companies
The Competition Policy Institute
United State of America
US Telephone Association
Virginia State Corporation Commission
Winstar Communications

CORPORATE DISCLOSURE STATEMENT

General Communication, Inc. is a publicly held corporation principally engaged in providing communications service and cable television services to the general public. MCIWorldCom owns approximately 19% of the shares, and has approximately 24% of the voting power of General Communication, Inc. General Communication, Inc. owns GCI, Inc., which has issued debt securities to the public. No other subsidiaries of General Communication, Inc. have outstanding debt or equity securities that are publicly held.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

Introduction 2

1. The 1996 Act and the Regulations. 3

2. Petition for Review of the FCC Order. 5

3. This Court's Reversal of the Eighth Circuit's Jurisdictional Rulings. 6

4. Proceedings on Remand. 6

REASONS FOR GRANTING THE WRIT 7

I. THE RURAL EXEMPTION REGULATION IS IMPORTANT TO FULFILL THE STATUE'S PURPOSE 8

II. THE VIEW THAT THE "PLAIN MEANING" OF THE ACT FORECLOSES THE IMPOSITION OF THE BURDEN OF PROOF ON INCUMBENT LECS IS CLEARLY ERRONEOUS UNDER THIS COURT'S CASES 12

A. The Regulation and the Eighth Circuit's Ruling 13

B. The Statute Does Not Qualify for "Plain Meaning" Treatment Under *Chevron* 13

C. Under *Chevron*, the FCC Regulation Passes Muster 15

III. THE EIGHTH CIRCUIT'S SUBSTITUTION OF ITS INTERPRETATION OF "UNDULY ECONOMICALLY BURDENSOME" FOR THE FCC'S IS CLEARLY ERRONEOUS AND INCONSISTENT WITH THIS COURT'S CASES REQUIRING DEFERENCE 19

IV. THE COURT OF APPEAL' RULING THAT THE REGULATION WAS INVALID BECAUSE OF THE ABSENCE OF EXPRESS REFERENCE TO OTHER AVAILABLE DEFENSES IS CONTRARY TO THE ADMINISTRATIVE LAW DOCTRINE OF FAIR NOTICE 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases **Page(s)**

Aluminum Co. v. Central Lincoln Util. Dist.,
467 U.S. 380 (1984) 21

AT&T Corp. v. Iowa Utils. Bd.
525 U.S. 366 (1999) ..... passim

Babbit v. Sweet Home Chapter of Comms. for a Greater Oregon, 515 U.S. 687 (1995) 21

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 14

Christensen v. Harris County,
___ U.S.___, 120 S. Ct. 1655 (2000) 24

Corning Glassworks v. Brennan,
417 U.S. 188 (1974) 18

Diebold, Inc. v. Marshall,
585 F.2d 1327 (6th Cir. 1978) 28

FTC v. Morton Salt Co.,
334 U.S. 37 (1948) 18

GCI Communications Corp. v. Alaska Pub. Utils. Comm'n,
Docket Nos. 3-AN-98-4759, AN-98-04903,
AN-98-04905 (Alaska Super. Ct.
March 4, 1999) 15

Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154 (D.C. Cir. 1986) .. 27

General Electric Co. v. EPA,
53 F.3d 1324 (D.C. Cir. 1995) 27

Goldwasser v. Ameritech Corp.,
222 F.3d 390 (7th Cir. 2000)..... 22

Holly Farms Corp. v. NLRB,
517 U.S. 392 (1996)..... 18

In re Fairpoint Communications Corp.,
2000 W.L. 1035785 (N.Y. Pub. Serv. Comm'n
June 6, 2000), petition for reh'g pending.....16

In re Helicon Telephone Pennsylvania, LLC,
2000 W.L. 347435
(Penn. Pub. Util. Comm'n Feb. 10, 2000) 16

In re TDS Datacom, Inc.,
1998 W.L. 835557
(Wis. Pub. Serv. Comm'n May 14, 1998)..... 12, 16

Iowa Utils. Bd. v. FCC,
219 F.3d 744 (8th Cir. 2000)..... passim

Iowa Utils. Bd. v. FCC,
120 F.3d 753 (8th Cir. 1997)..... 5

Latin America/Pacific Coast SS Conference v. Federal Maritime Comm'n,
465 F.2d 542 (D.C. Cir. 1972) 15

Pauley v. BethEnergy, Mines, Inc.,
501 U.S. 680 (1991)..... 21

Pension Benefit Guar. Corp. v. LTV Corp.
496 U.S. 633 (1990)..... 17

Puerto Rico v. Federal Maritime Comm'n,
468 F.2d 872 (D.C. Cir. 1972) 16

Rollins Envtl. Servs. v. EPA,
937 F.2d 649 (D.C. Cir. 1991) 27

Rust v. Sullivan,
500 U.S. 173 (1991) 21

Satellite Broad. Co. v. FCC,
824 F.2d 1 (D.C. Cir. 1987) 27

SEC v. Ralston Purina Co.,
346 U.S. 119 (1953) 18

Sprint Communications Co. L.P.,
1997 W.L. 152651 (Minn. Pub. Util. Comm'n
January 21, 1997) 16

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 21

United States v. Drasen,
845 F.2d 731 (7th Cir. 1988) 28

United States v. New York, N.H. & H. R. Co.,
355 U.S. 253 (1957) 15, 17

United States v. Southern Management Corp.
955 F.2d 914 (4th Cir. 1992) 28

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.
455 U.S. 489 (1982) 28

Xin-Chang Zhang v. Slattery,
55 F.3d 732 (2d Cir. 1995) 14

Zenith Radio Corp. v. United States,
437 U.S. 443 (1978) 21

Statutes and Regulations

Telecommunications Act of 1996,
Pub. L. 104-104, 1101 Stat. 56 ..... passim

28 U.S.C.
§ 1254(1) 2
§ 2342(1) 5

47 U.S.C.
§ 153(37) 3
§ 251(b) 2, 19
§ 251(b)(7) 25
§ 251(c) ..... passim
§ 251(c)(1)(d) 25
§ 251(d) ..... i, 23
§ 251(f) ..... passim
§ 251(f)(1) 15, 27
§ 251(f)(1)(A) 3, 27
§ 251(f)(1)(B) 4, 14
§ 251(f)(2) 3, 4
§ 251(f)(2)(A) 4
§ 251(f)(2)(B) 4
§ 253 2
§ 254 25
§ 402(a) 5

47 CFR
§ 43.21 11
§ 51.405 ..... i, 5, 6
§ 51.405(a) 13
§ 51.405(c) 6, 19
§ 51.405(d) 19
§ 51.501(c)-(d) 23

§ 51.501(d) 23

S. Ct. Rule 16.1 12

Legislative Materials

141 Cong. Rec. S7885 (daily ed. June 7, 1995) 9

141 Cong. Rec. S7888 (daily ed. June 7, 1995) 9

141 Cong. Rec. S8476 (daily ed. June 15, 1995) 8

142 Cong. Rec. H1163B (daily ed. Feb. 1, 1996) 24

142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) 12

House Bill 1555
H. R. Rep. No. 204, pt. 1 (1995) 22

Senate Bill 652
S. Rep. No. 104-23 (1995) 22
S. Rep. No. 104-230 (1996) 24

Administrative Materials

In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15499 (1996) 4

In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 20166 (1996) 5

Other Authorities

K. Davis and R. Pierce, *Administrative Law Treatise,* § 10.7 at 169 (3d ed. 1994 & 1999 Supp.) 15

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, General Communication, Inc. ("GCI") respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on July 18, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A, pp. 1a-37a, *infra*) is reported at 219 F.3d 744. The Federal Communications Commission ("FCC") order reviewed by the Eighth Circuit is reported at 11 F.C.C.R. 15499 (1996). The portion of that order that is

relevant to the issues raised in this Petition is reproduced at Pet App. B, pp. 38a-85a, *infra*.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was issued on July 18, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, amending the Communications Act of 1934 and codified at 47 U.S.C. §§ 251-253 (the "1996 Act" or "Act"), are reproduced at Pet. App. C, pp. 86a-103a, *infra*. The pertinent FCC regulations promulgated pursuant the 1996 Act, 47 C.F.R. §§ 51.401-51.405 are reproduced at Pet. App. D, pp. 104a-105a, *infra*.

STATEMENT OF THE CASE

Introduction

GCI is an Alaskan telecommunications company that seeks to expand its operations into rural areas of Alaska. In Alaska, all but one of approximately 24 service areas are designated as rural service areas, including those servicing the state capitol and the third largest city in Alaska – Juneau and Fairbanks. GCI is currently engaged in administrative proceedings before the Regulatory Commission of Alaska and in appellate litigation before Alaska's state courts regarding the application of rural exemptions from certain statutory duties granted by the 1996 Act, as they apply to incumbent rural competitors of GCI in Juneau and Fairbanks.

This petition challenges rulings of the Eighth Circuit in *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), in which the court invalidated an FCC regulation that interprets a provision of the Act codified at 47 U.S.C. § 251(f). Section 251(f) authorizes state commissions to grant exemptions, modifications or waivers to rural and small local

exchange companies ("LECs"), releasing the LECs from certain affirmative obligations the Act imposes on them to facilitate the entrance of new competitors into their markets.

1. **The 1996 Act and the Regulations.** The 1996 Act fundamentally altered the structure of the telecommunications industry by prohibiting state laws that impede competition, and by imposing affirmative obligations on incumbent LECs to facilitate the entry of new competition into their local markets. In particular, Section 251(c) of the Act requires incumbent LECs to provide requesting carriers with access to the LEC's own networks in three ways: (1) LECs must sell local telephone services to requesting carriers at wholesale rates for resale to end users; (2) they must lease elements of their network to requesting carriers on an unbundled basis; and (3) they must interconnect their own networks with the facilities of the requesting carrier at any technically feasible point. 47 U.S.C. § 251(c). In addition, Section 251(b) of the Act creates other obligations for incumbent LECs, including the duty to provide number portability.

The Act affords "rural" and "small" incumbent LECs certain protections with respect to these obligations to compete under § 251(c) and § 251(b).[1] Specifically, a rural LEC is exempted from the § 251(c) affirmative obligations until it "has received a bona fide request for interconnection, services, or network elements, and ... the State commission determines ... that such request is not unduly economically burdensome, is technically feasible, and is consistent with [the universal service requirements of the Act]." 47 U.S.C. § 251(f)(1)(A). The Act then requires the state commission,

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[1] A rural telephone company, as defined in 47 U.S.C. § 153(37), is an LEC that, in essence, does not provide common carrier service to an urban center and does not provide exchange service to an area with more than a certain number of access lines. A "small" LEC is one with fewer than two percent of the nations's subscriber lines. 47 U.S.C. § 251(f)(2).

upon receiving notice of a *bona fide* request made to the rural telephone company, to "conduct an inquiry for the purpose of determining whether to terminate the exemption." *Id.*, § 251(f)(1)(B). The Act gives the state commission 120 days to make the determinations as to whether the request would be unduly economically burdensome, technically infeasible, and inconsistent with the universal service provisions in the Act. *Id.* The Act is silent as to who bears the burden of proof to show the state commission that the exemptions available for a rural incumbent LEC should or should not be terminated.

The Act also affords small LECs the right to "petition a State commission for a suspension or modification of the application of ... requirements of [§§ 251(b)-(c)]." *Id.*, § 251(f)(2). The state commission must then, within 180 days after receiving the petition, determine whether the suspension or modification "is necessary to avoid a significant adverse economic impact on users of telecommunications services generally; to avoid imposing a requirement that is unduly economically burdensome; or to avoid imposing a requirement that is technically infeasible," *id.*, § 251(f)(2)(A), and also to determine if the requested suspension or modification "is consistent with the public interest, convenience and necessity." *Id.*, § 251(f)(2)(B).

Pursuant to the Act, the FCC, after a notice and comment period, published implementing regulations as part of its First Report and Order. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 F.C.C.R. 15499 (1996) ("FCC Order," excerpted at Pet. App. B, *infra*). One of the FCC's regulations places the burden of proof on rural companies and small LECs to prove their entitlement to the exemptions (for rural companies) or to secure suspension or modification of the Act's requirements (for small LECs). 47 C.F.R. § 51.405. The regulations also require that to qualify for continuing exemption or suspension based on the "unduly

economically burdensome" standard, rural companies or small LECs "must offer evidence that the application of the requirements ... of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." *Id.*, § 51.405(c) & (d).[2]

2. **Petition for Review of the FCC Order.** Numerous challenges to the regulations, filed across the country by incumbent LECs and state utility commissions, were consolidated in the United States Court of Appeals for the Eighth Circuit. That court had jurisdiction to review the FCC Order pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). Timely petitions to intervene in the Eighth Circuit proceedings were filed by numerous parties including GCI.[3] Initially, the Eighth Circuit invalidated many of the FCC's regulations on the ground that the FCC had no jurisdiction under the 1996 Act to regulate intrastate telecommunications. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 795, 800, 804-06 (8th Cir. 1997). With regard to the regulations at issue in this Petition, the Eighth Circuit held that

> [t]he plain meaning of subsections 251(f)(1) (governing exemptions) and 251(f)(2) (governing suspensions and modifications) indicates that the state

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[2] The FCC has issued an order making clear that 47 CFR § 51.405 was not intended to require an LEC to show such undue burden in every case, but only when the LEC was seeking to justify exemption, suspension or modification on the statutory ground of undue burden. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 20166 at ¶ 15 (1996). Thus, the regulation would not preclude an LEC from obtaining exemption, suspension or modification on one of the other statutory grounds (such as technical infeasibility) even if it did not offer evidence of undue burden.

[3] The Eighth Circuit granted GCI's motion to intervene, along with motions by many others, on October 10, 1996. The court's order is reproduced at Pet. App. E, pp. 106a-117a, *infra*.

> commissions have the exclusive authority to make these determinations, and nothing in either of these provisions, or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations.

Id. at 802. In the court's view, the FCC had no power "to promulgate standards governing state commission determinations of exemptions and modifications." *Id.*

3. **This Court's Reversal of the Eighth Circuit's Jurisdictional Rulings.** This Court reversed all of the Eighth Circuit's jurisdictional rulings, including those concerning the regulations at issue here. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999). The Court held that the statutory provisions relied upon by the Court of Appeals did not displace the FCC's general rulemaking authority, including the power to issue "rules to guide the state-commission judgments" in discharging their regulatory authority over exemptions, suspensions and modifications. *Id.* (internal brackets omitted).

4. **Proceedings on Remand.** On remand, the Eighth Circuit addressed the merits of the challenges to the regulations. The court again invalidated many of the regulations promulgated as part of the FCC Order, including certain of the rules contained in 47 CFR § 51.405 relating to exemptions, suspensions and modifications.

Specifically, the court invalidated portions of Section 51.405 on three grounds. *First,* it held that Section 51.405(c), the provision defining "unduly economically burdensome," was invalid because, according to the court, it somehow foreclosed consideration of the other statutory grounds that rural and small LECs had available to them to prevent termination of a rural exemption or to secure a suspension or modification of the statute's obligations. Pet. App. A at 27a. *Second*, it held that the FCC's interpretation of the statutory term "unduly economically burdensome" was

an unreasonable construction of § 251(f) of the Act, because, according to the court, the regulation did not permit state commissions even to *consider* evidence of "economic burdens ordinarily associated with competitive entry," *id.* at 29a, and thus prevented them from considering "the full economic burden on the [incumbent] LEC." *Id. Third*, it held that the regulation's allocation of the burden of proof on the rural exemption to the incumbent LEC violated the "plain meaning of the statute" which, in its view, "requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemptions." *Id.* at 31a-32a.

REASONS FOR GRANTING THE WRIT

Although the Eighth Circuit is the first federal court of appeals to rule upon the validity of the regulations implementing Section 251's rural and small LEC exemptions, the impact that this decision will have upon the telecommunications industry, as it attempts to service rural American consumers, will be profound. Due to the consolidation of these challenges in one court, which caused nearly every major player in the telecommunications business to participate as either a party or an intervenor, the Eighth Circuit's clearly erroneous interpretation of a major piece of federal legislation will not, as a practical matter, be subject to correction by development of the law in other circuits.

The Eighth Circuit's decision does violence to the text and history of the Act and is inconsistent with bedrock administrative law decisions from this Court as well as other circuits. Left standing, the decision permits state commissions to perpetuate monopolies that threaten to leave rural and small town America far behind the accelerating pace of technological innovation in the telecommunications field. Absent review by this Court, a panel of three Eighth Circuit judges alone will have effectively foreclosed the

ability of the FCC to effectuate policy choices delegated to the FCC by the Act in implementing the Act's provisions that are designed to protect rural Americans from anti-competitive practices.

I. THE RURAL EXEMPTION REGULATION IS IMPORTANT TO FULFILL THE STATUTE'S PURPOSE

By invalidating the regulations, the Eighth Circuit has resurrected substantial barriers to competition in the market for telephone service in rural areas and small cities. As a consequence, the decision undercuts one of the Act's fundamental purposes, *i.e.*, the protection of the rights of all rural and small-town Americans to enjoy on a timely basis the full benefits of technological development in the telecommunications field. Simply put, the Eighth Circuit's decision perpetuates the "digital divide" condemning rural residents to the economic version of second-class citizenship in twenty-first century America.[4]

This Court has recognized that the Act "fundamentally restructures local telephone markets." *AT&T Corp.*, 525 U.S. at 371. In the 1996 Act, Congress gave the FCC the extraordinarily complex and difficult task of reversing the "more than century-old tradition" of state-regulated

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[4] Congress was concerned that rural Americans not be deprived of the benefits of competition:

> competition coupled with universal service is a must for rural states to have access for all citizens. If major telecommunications networks such as Internet access are denied in the rural areas, state of the art technology will be deployed only in the mass market with dense population where the providers are able to obtain cost-benefit-ratios which are attractive to the provider. It is imperative that Congress understand this issue.

See 141 Cong. Rec. S8476 (daily ed. June 15, 1995) (remarks of Senator Burns).

monopolization which preceded the 1996 Act. *See id.* at 402 (Thomas, J. concurring and dissenting). To accomplish its regulatory task, the FCC must not only contend with entrenched state rules and regulations, but must also effectively deal with a longstanding nationwide culture of regulatory attitudes encouraging monopolization and fearing competition. Moreover, the FCC must bear in mind Congress' particular concern about the timeliness of delivery of benefits of competition to all markets.[5]

The FCC's interpretation of "unduly economically burdensome" requires all state commissioners, and the local monopolies they have been regulating for years, to justify perpetuation of monopolistic practices on some basis other than the desire of a local monopoly to avoid the economic adjustments inherent in the introduction of competition into the marketplace. The Eighth Circuit's elimination of this regulation sends a message to all rural incumbent LECs that, under the rubric of general administrative discretion, they can persuade the local regulators with whom they have been dealing for years to perpetuate the monopolistic practices in place before the 1996 Act took effect. Given the cultural predilection in favor of doing just that, the predictable consequences of the Eighth Circuit's decision will be to perpetuate rural and small town monopolies and retard the

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[5] Describing the new Act as "a paradigm shift" in regulatory philosophy, 141 Cong. Rec. S7888 (daily ed. June 7, 1995), Senator Pressler observed that "history teaches us that, under existing law, the FCC and the courts have not been able to respond to market and technology changes in an expeditious manner," that "[t]his delay prevents the consumer from gaining the benefits of competition," and that "[w]ithout legislation, it may be years, or decades, before America sees the benefits of a truly open and competitive telecommunication industry." *See id.* at S7885.

introduction of newly available technology in those locations.[6]

The Eighth Circuit raised the barriers to competitive entry even higher when it invalidated the burden of proof regulation. The Eighth Circuit's opinion showed no regard at all for the specialized regulatory context in which state commissions must make rural exemption determinations. Indeed, the Eighth Circuit ignored the FCC's stated reasons for its regulations and treated the issue as if it were a simple choice of burden allocation between two private parties contesting liability in an ordinary civil suit.

But exemption proceedings differ greatly from private civil litigation. Upon receipt of a *bona fide* § 251(c) request, the statute imposes upon the state commission (not the requesting party) a duty to resolve the exemption issue within 120 days. Broadly stated, the state commission must determine whether the competitive LEC's ("CLEC's") request is technically feasible vis-à-vis the rural LEC's network, whether the request will result in undue economic burden to the rural LEC, and whether the request will harm or conflict with the principles of universal service. As a matter of fairness and practicality, the burden of proof should lie with the rural LEC, as the exclusive possessor of information relevant to the state commissions' determination.

For instance, a rural LEC uniquely possesses the evidence on such issues as: (1) its financial health and status;

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[6] The Eighth Circuit professed disagreement with the FCC as to the consequences of invalidation of the regulation, expressing the view that state commissioners would not render decisions "automatically continuing the exemption, or 'automatically' granting a petition for suspension or modification." Pet. App. A at 30a. This is a classic example of the kind of prediction of "real world" consequences of regulatory choices that this Court has deemed the province of the expert regulatory agency and well beyond the judicial ken. *See* p. 16, *infra*.

(2) its ability to withstand the costs of the negotiation and arbitration process; (3) its ability to withstand the costs of providing the services requested by the CLEC; (4) its ability to withstand the expected and predictable competitive pressures exerted by the CLEC; and (5) its network design and ability to facilitate the CLEC's requests. Only the rural LEC knows the size and demographic breakdown of its customers and possesses the information regarding the costs of serving these customers.[7] Moreover, the rural LEC can provide the engineering details of its network to show whether or not the CLEC's request for services presents a technical interconnection problem for the rural LEC's network. Finally, the CLEC is not privy to information concerning the financial situation of the rural LEC.[8] Without this sort of information, the state commission would be unable to determine accurately what effect a particular market shift might have on the rural LEC's cash flows, cash reserves, capital, or equity, what effect the CLEC's request will have on the revenue the rural LEC earns from interstate access charges (one of the largest sources of revenue for the rural LEC), and whether interconnection at a particular point is technically feasible.

Because LECs know that CLECs will not have access to the information necessary to satisfy the burden of proof themselves, the Eighth Circuit, by assigning the burden to the CLEC, has given rural LECs every incentive to delay or

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[7] A large majority of rural LECs are members of the National Exchange Carriers Association ("NECA"). These LECs "pool" their costs and charge pooled rates, rather than charging company-specific rates. Because there is no regulatory review of individual company costs and revenues, this information remains inaccessible to competing carriers that request the incumbent LECs' exemptions to be lifted.

[8] For example, LECs with annual revenues below an indexed cap, currently at $112 million per year, are exempt from extensive cost reporting requirements set out at 47 CFR § 43.21.

withhold this data.[9] The Eighth Circuit's opinion admits that the rural monopolies are "entrenched." Pet. App. A at 29a. Allocation of the burden of proof to the entrenched monopoly is an essential part of the process contemplated by the Act if state commissions are to perform, in a timely fashion, the public duty the Act imposes on them and make reliable determinations regarding the continuation of the rural exemption.

II. THE VIEW THAT THE "PLAIN MEANING" OF THE ACT FORECLOSES THE IMPOSITION OF THE BURDEN OF PROOF ON INCUMBENT LECS IS CLEARLY ERRONEOUS UNDER THIS COURT'S CASES

The Eighth Circuit must have been consulting a different statute when it concluded that the "plain meaning" of the 1996 Act places the burden of proof upon carriers seeking interconnection in a rural market to show that the incumbent carrier would not suffer undue economic burden. The court's reading of the statute is so clearly erroneous that it would be an appropriate candidate for the exercise of this Court's plenary authority to reverse summarily the decision. S. Ct. Rule 16.1 But even should this Court decide that summary disposition is inappropriate, the inconsistency of the Eighth Circuit's decision with this Court's cases discussing methods of statutory interpretation in the administrative law context and the importance of this decision to the administration of federal law warrants the exercise of this Court's certiorari jurisdiction. GCI does not

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[9] Congress was well aware of the risks of delay in administrative proceedings: "[u]nnecessary delays will do nothing more than invite vested interests to 'game' the regulatory process to prevent or delay competition." 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (remarks of Senator Breaux). *See also In re TDS Datacom, Inc.*, 1998 W.L. 835557 at *22 (Wis. Pub. Serv. Comm'n May 14, 1998) (the incumbent rural LEC "has engaged in extraordinary delay of the entire interconnection process").

ask this Court to correct error in a case applicable only to its own interests; the Eighth Circuit's invalidation of the burden-of-proof regulation will affect an entire industry nationwide.

A. The Regulation and the Eighth Circuit's Ruling – The FCC regulation at issue, 47 C.F.R. § 51.405(a), states:

> Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that the rural telephone company should be entitled, pursuant to § 251(f)(1) of the Act, to continued exemption from the requirements of § 251(c) of the Act.

The FCC Order set forth the FCC's reasons for placing the burden of proof on the rural LECs in exemption inquiries (Pet. App. B at 75a, ¶ 1263):

> Given the pro-competitive focus of the 1996 Act,...[w]e conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request.

The Eighth Circuit, without ever addressing the FCC's above-stated reasons for the regulation, invalidated it on the ground that "the plain meaning of the statute requires the party making the [*bona fide* § 251(c) request] to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." Pet. App. A at 31a-32a.

B. The Statute Does Not Qualify for "Plain Meaning" Treatment Under *Chevron* – The *Chevron* rule of deference to any reasonable administrative construction of

the Act, even if the court would prefer a different construction, is fully applicable to agency rules allocating burdens of proof. *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 755-56 (2d Cir. 1995). The first question the Eighth Circuit should have asked is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842. (1984). Congress certainly has not in the statute "directly spoken to the precise question at issue" – *i.e.*, the proper allocation of the burden of proof. *Id.*

If Congress had intended to preempt the agency's discretion in allocating the burden of proof in accordance with its own expertise, it would have included a declaratory sentence in the form of "X shall have the burden of proof." The absence of such a simple congressional declaration or equivalent language means that Congress implicitly delegated the burden of proof allocation judgment to the expert administrative agency that is, after all, far more familiar with the complex economic and technological judgments that must be made to determine whether to terminate an exemption.

The Eighth Circuit held that because the statute permits the rural exemption to continue "until" a § 251(c) request is made, and also provides that the exemption shall "terminate" if the three statutory criterion are met, the statute on its face plainly means to place the burden of proof on the party making the *bona fide* request.[10] The Eighth Circuit's explanation of its holding rests not on reasoning, but on a series of non sequiturs. The only "plain meaning" that can

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[10] In fact, nothing on the face of the statute places any burden on the party making the *bona fide* request. Instead, once the *bona fide* request is made, and notification is given to the state commission, the Act mandates that the *state commission* "conduct an inquiry for the purpose of determining [whether the statutory criteria are met]." 47 U.S.C. § 251(f)(1)(B).

be derived from the use of the terms "until" and "terminate" in the statute is that the rural exemption granted by the statute is to continue until the state commission determines that none of the three criteria for continuing it is met. The statute, on its face, does not separately compel the conclusion that the burden of proof must be allocated to one party or the other. *GCI Communications Corp. v. Alaska Pub. Utils. Comm.*, Nos. 3-AN-98-4759, AN-98-04903, AN-98-04905 at p. 5 (Alaska Super. Ct. March 4, 1999) (assigning burden of proof to rural LEC after determining that "[t]he Act does not expressly assign the burden of proof in determining whether a § 251(f)(1) exemption should be terminated"). *Cf. Latin America/Pacific Coast SS Conference v. Federal Maritime Comm'n*, 465 F.2d 542, 552 (D.C. Cir. 1972) (burden of proof not placed on Federal Maritime Commission even though statute states that "Commission ... *shall* ... permit [dual rate contracts] ... *unless* the Commission finds that the contract ... will be detrimental to the commerce of the United States ...").

C. Under *Chevron*, the FCC Regulation Passes Muster – In the absence of an express statutory allocation of the burden of proof, the FCC's regulation must be tested under *Chevron's* deferential standard. In this case, the FCC's regulatory interpretation, far from being outside the bounds of reasonable statutory construction, is in fact the preferred construction of the Act. A well-established principle of the law of evidence is that, regardless of the formalities of pleading practice, the burden of proof can properly be placed with the party having the best access to the proof. *See* K. Davis and R. Pierce, Administrative Law Treatise, § 10.7 at 169 (3d ed. 1994 & 1999 Supp.) ("general policy of imposing burden of proof on the party with the best access to the relevant evidence"); *see also United States v. New York, N.H. & H. R. Co.*, 355 U.S. 253, 256 n.5 (1957). Thus, "even in an ordinary civil case, the doctrine that plaintiff has the burden of proof, is subject to overriding

qualifications placing burdens on those naturally possessed of pertinent evidence." *Puerto Rico v. Federal Martime Com.*, 468 F.2d 872, 881 (D.C. Cir. 1972). In this case, the FCC made precisely that judgment: *i.e.*, that "the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request." Pet. App. B at 75a ¶ 1263. State courts and regulatory agencies have, prior to issuance of the Eighth Circuit's opinion, found this allocation of the burden of proof to be a reasonable interpretation of the Act. *See GCI Communications Corp. v. Alaska Pub. Utils. Comm.*, *supra* at 7 (state commission erred when it placed burden of proof on requesting party because "fairness concerns prescribe the conclusion that the party in control of the evidence, in this case [the party claiming the rural exemption], bears the burden of proving that evidence").[11]

Placement of the burden of proof with the party in control of the relevant information is obviously consistent with the purpose of the statute, which in this case is to enable

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[11] *See also, In re TDS Datacom, Inc.*, 1998 W.L. 835557 at * 27 n.4 (a small, rural ILEC contending that loss of market share may detrimentally affect the public interest, "would be expected to have the burden of proof" because "[t]he ILEC would naturally be the party in control of the information most useful to consideration of this argument"); *In re Fairpoint Communications Corp.*, 2000 W.L. 1035785 at *3-*4 (N.Y.Pub. Serv. Comm'n June 6, 2000), *petition for reh'g pending* (same); *In re Helicon Telephone Pennsylvania, LLC*, 2000 W.L. 347435 at *5 (Penn. Pub. Util. Comm'n Feb. 10, 2000) (FCC Rule 405 required state commission to change prior precedent, which had placed burden of proof on requesting carrier, to impose burden on incumbent LEC). *Cf. Sprint Communications Co L.P.*, 1997 W.L. 152651 at *4 (Minn. Pub. Util. Comm'n, January 21, 1997) (in arbitration proceeding, commission placed burden of proof on rural LEC "with respect to all issues of material fact," authorizing ALJ to "shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute" or to "reallocate the burden of proof to comply with any applicable FCC regulations").

state commissions to make the most accurate determinations under the three statutory criteria relating to the exemption. The FCC's expert administrative judgment regarding the location of the relevant evidence is precisely the type of "real-world" judgment that this Court has ruled is within the core of the agency's expertise and beyond the competence of reviewing federal courts. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[i]ndeed, the judgments about the way the real-world works that have gone into the PBGC's anti-follow-on policy are precisely the kind that agencies are better equipped to make than are courts"). *See also AT&T Corp.*, 525 U.S. at 396 (impact of FCC's "pick and choose" rule on negotiations "is a matter eminently within the expertise of the Commission and eminently beyond our ken").

Moreover, placement of the burden of proof on the basis of the locus of the relevant evidence is especially important in this statutory scheme. The statutory scheme is not based on a traditional private party litigation model, where rounds of discovery, delay and associated cost are frequently tolerated. Instead, Congress has mandated that the state commission gather the information necessary and then make three complex decisions in connection with the judgment as to continuation of the exemption within 120 days. Under these circumstances, it is more than sensible for the FCC to base the allocation of proof burdens on the reality of where the state commission must go to get the evidence most efficiently and most quickly, rather than on the formalities of pleading practice. *See New York, N.H. & H.R. Co.*, 355 U.S. at 263 (1957) (In allocating the burden of proof, "[i]t is the substance, not the form, which should be our concern").

The Eighth Circuit also improperly ignored the FCC's reasoning that because of the "pro-competitive focus of the 1996 Act" it is "appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements." The existing rural monopolies are given an

"exemption" that can be terminated whenever none of the three statutory criteria for continuing it is met. The Eighth Circuit disregarded the approach generally taken in this Court of assigning burdens of proof so as to ensure that exemptions to statutory requirements are not applied to deny protections to beneficiaries of the legislation. *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953) ("[k]eeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable"); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (describing "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits"); *Corning Glassworks v. Brennan*, 417 U.S. 188 (1974) (noting that structure and history of Fair Labor Standards Act supports notion that, like other statutes, proving an exemption is an affirmative defense that shifts the burden of proof to the party claiming the exemption). *Cf. Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (in construing NLRA exemptions from coverage "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach").

In any event, because the statute is silent on the specific issue, the Eighth Circuit's disposition of this issue as one dictated by the plain meaning was clearly erroneous, and this Court should grant certiorari in order to bring the interpretation of this important statute in line with this Court's precedents.

III. THE EIGHTH CIRCUIT'S SUBSTITUTION OF ITS INTERPRETATION OF "UNDULY ECONOMICALLY BURDENSOME" FOR THE FCC'S IS CLEARLY ERRONEOUS AND INCONSISTENT WITH THIS COURT'S CASES REQUIRING DEFERENCE

Section 251(f) provides that the issues of exemption for a rural LEC and suspension or modification for a small LEC turn in part on a state commission's determination of whether compliance by the LEC with the Act's requirements would be "unduly economically burdensome." The statute is devoid of any definition of which types of burdens qualify as "economic," and what level of "economic burden" is to be classified as "undue." Because Congress did not speak directly to these issues, the FCC adopted its own interpretation, requiring rural LECs seeking to justify continued exemption from Section 251(c) duties, and small LECs seeking to justify suspension or modification of their obligations under Sections 251(b) or 251(c), to "offer evidence that the application[]" of these provisions "would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c)-(d).

The Eighth Circuit invalidated the FCC's regulation, but in so doing, grossly misconstrued it. The court interpreted the regulation as preventing state commissions from even *considering* as part of the total mix of burdens on the LEC those economic burdens "ordinarily imposed on a small or rural ILEC by a competitor's requested efficient entry." Pet. App. A at 30a. Thus, according to the court, the regulation prohibited a state commission from "look[ing] to the whole of the economic burden the request imposes, not just a discrete part." *Id.* Nothing on the face of the regulation supports this judicial misinterpretation.

The regulation does not require state commissioners to exclude anything whatsoever from the record they make. Nor does the regulation preclude the state commissioners from considering any kind of economic burden, whether attributable to "efficient competitive entry," or any other source. The regulation provides only that a finding that the incumbent LEC suffered "economic burden that is typically associated with efficient competitive entry" is not by itself sufficient to justify exemption, suspension or modification. The Eighth Circuit effectively rewrote the regulation by substituting the words "exclusive of" for the FCC's choice of the word "beyond."

The Eighth Circuit's ruling rested not only on a complete mischaracterization of the regulation, but also on a method for judicially reviewing administrative regulations that is inconsistent with this Court's cases. The Eighth Circuit did not contend that the regulation was foreclosed by the plain language of the statute. But rather than applying *Chevron*'s well-known "step-two" inquiry into whether the agency's interpretation of the statute was a plausible one, it constrained agency power in a way that deprives the FCC in this case (and other agencies whose regulations are interpreted in the Eighth Circuit) of authority clearly afforded it by *this* Court's administrative law jurisprudence. The Eighth Circuit's approach effectively requires a party arguing that a court should defer to an agency regulation to point to express language in the statute or legislative history showing that Congress explicitly considered the policy balance struck by the agency and endorsed it. Pet. App. A at 29a-30a. ("We have found no indication that Congress intended such a cramped reading of the phrase. If Congress had wanted the state commission to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural ILEC by a competitor's requested efficient entry, it could easily have said so."). This approach is radically inconsistent with *Chevron* and its

progeny, under which a court must defer to an agency's interpretation of a gap in a statute, unless the interpretation is an "impermissible" or "implausible" construction of the statute.[12]

The FCC regulation is fully consistent with the legislative history of the statute, the language and structure of the Act, and its legislative purpose. As the Eighth Circuit's opinion concedes, "[i]t is clear [from the legislative history] that Congress intended that all Americans, including those in sparsely settled areas served by small telephone companies, should share the benefit of the lower cost of competitive telephone services and the benefits of the new telephone technologies, which the Act was designed to provide." Pet. App. A at 28a. A primary statutory goal was to deploy to all Americans the benefits of competition, including lower prices and state of the art telecommunication services, to prevent the "digital divide" from disadvantaging

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[12] *Rust v. Sullivan*, 500 U.S. 173, 184 (1991); *Babbit v. Sweet Home Chapter of Comms. for a Greater Oregon*, 515 U.S. 687, 708 (1995). Indeed, this case involves a regulatory program that is "complex and highly technical" in which "the identification and classification of relevant criteria necessarily require significant expertise and entails the exercise of judgment grounded in policy concerns," and as such is entitled to the maximum degree of deference under *Chevron*. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994), *quoting Pauley v. BethEnergy, Mines, Inc.*, 501 U.S. 680, 697 (1991) (internal quotations omitted). As this Court has noted, the 1996 Act is in many important respects a "model of ambiguity or indeed self-contradiction" and that in passing the statute "Congress [was] well aware that the ambiguities it [chose] to produce in the statute [would] be resolved by the implementing agency." *AT&T*, 525 U.S. at 397. Because the FCC's interpretation represents "a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" the usual rules of deference "have particular force ... ." *Aluminum Co. v. Central Lincoln Util. Dist.*, 467 U.S. 380, 390 (1984); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (same).

those Americans living in rural areas.[13] Congress created provisions for exemptions, and suspension and modification of certain of the duties imposed by the new statute, to assure that rural and small telephone companies do not sustain "undue economic injury" in the transition to a competitive market. However, these exemptions were not intended to be permanent, nor were they intended to be justifiable solely on the ground that the incumbent LECs desired to avoid all injury that might occur by virtue of the entrance of new competition.

The focus of Section 251(f) is on those economic burdens specifically associated with the Act's imposition, in § 251(c), of a special set of affirmative duties on rural LECs, in order to facilitate entry of new competition into the rural LEC's market. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir., 2000) (holding that an LEC's "footdragging" in complying with § 251(c)'s affirmative obligations does not constitute a Sherman Act violation because § 251(c) contains "precisely the kinds of affirmative duties to help one's competitors that . . . do not exist under the unadorned antitrust laws"). In Section 251(c), Congress

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[13] The House and Senate reports relating to the Act reflect the legislative emphasis on competition and deregulation. *See* S. Rep. No. 104-23, at 1-2 (1995) (reciting purpose of Senate Bill 652); *id.* at 10 ("Senator Dole advocated quick passage of telecommunications legislation. He noted that the rural Americans are concerned about telecommunications legislation, as it offers tremendous opportunities for economic growth. He testified that legislation should underscore competition and deregulation, not reregulation"). H. R. Rep. No. 204, pt. 1, at 47-48 (1995) (House Bill 1555 "promotes competition and reduces regulation in order to secure lower prices and high quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies," and "indeed, the enormous benefits to American businesses and consumers from lifting the shackles of monopoly regulation will almost certainly earn the Communications Act of 1995 the distinction of being the most deregulatory bill in history").

has created a unique set of affirmative obligations to be imposed for the first time in the history of the industry on currently functioning businesses, which previously operated in a monopoly environment sanctioned by state and federal law. Furthermore, these obligations are technologically complex. While the statute includes provisions designed to ensure that rural LECs and other incumbent LECs are compensated for their costs, and also receive a reasonable profit for their efforts in meeting their new affirmative obligations, *see* § 251(d), it is still conceivable that imposition of these affirmative duties to facilitate new competition could impose on incumbent LECs unanticipated costs, the burden of which could be heightened by the particular financial state of the incumbent LEC at the time of the *bona fide* request.

Thus, the statute sensibly includes protection against "unduly economically burdensome" requests by competitors for access to the services and facilities of the incumbent LECs. However, nothing in the statute supports the notion that Congress, by adopting the phrase "unduly economically burdensome," intended to protect the existing monopolies from "the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.501(c)-(d). This construction, which the Eighth Circuit in effect adopted, is implausible, because it undermines the Act's fundamental goal of bringing to rural customers the anticipated benefits of competition, including lower prices and better quality service. Thus, if any "economic burden that is typically associated with efficient competitive entry" were sufficient to support continuation of the rural exemption, the state commission would be empowered, through the device of this delphic phrase, to reinstitute the regulated monopoly tradition which the statute is designed to bring to an end. It is unreasonable to assume that Congress would make so massive a delegation of federal lawmaking power to state commissions through the device of such a verbal Trojan

horse. *See Christensen v. Harris County*, – U.S. –, 120 S. Ct. 1655, 1664 n* (2000) (Scalia, J. concurring).

The FCC regulation carefully reconciles the statutory goal of protecting the incumbent LECs from undue economic burdens arising from the historically unprecedented demand that they provide affirmative assistance to their new competitors, with the goal of making sure that the state commissioners, in exercising their considerable discretion, do not effectively eliminate the competition goal of the Act by permitting local monopolies to continue to suppress competition simply because the local companies want to continue enjoying monopoly status.[14] *See AT&T Corp.*, 525 U.S. at 395 ("[i]t is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice").

This Court, in *AT&T Corp*, held that "while it is true that the 1996 Act entrusts state commissions with the job of ... granting exemptions to rural LECs, ... these assignments ... do not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments." *AT&T Corp.*, 525 U.S. at 385. Rule 405 does precisely that: *i.e.*, it "guide[s] the state commission's judgments" in applying the "unduly economically burdensome" concept in the statute.

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[14] The FCC's reconciliation of these statutory goals is consistent with the legislative history of the exemption and suspension/modification provisions at issue. The Conference Report "adopts a new model for interconnection that incorporates provisions from both the Senate Bill and the House Amendment" into what is now the current section 251 of the Act. S. Rep. No. 104-230 at 117-22 (1996). *See also* 142 Cong. Rec. H1163B (daily ed. Feb. 1, 1996) (remarks of Rep. Lincoln) ("the waivers and modifications created in both the Senate and House bills were carefully blended in conference to balance the desire to promote competition in the local exchange area while ensuring that smaller providers have the necessary flexibility to comply with the bill's interconnection requirements").

The Eighth Circuit's opinion prevents the FCC from balancing the policies and technological concerns within its expertise to impose limits on the circumstances in which state commissions may grant exemptions. Due to the importance of the issue to rural Americans and innovative would-be entrants in rural markets, this Court should grant a writ of certiorari to bring the Eighth Circuit's decision into line with this Court's jurisprudence.

IV. THE COURT OF APPEALS' RULING THAT THE REGULATION WAS INVALID BECAUSE OF THE ABSENCE OF EXPRESS REFERENCE TO OTHER AVAILABLE DEFENSES IS CONTRARY TO THE ADMINISTRATIVE LAW DOCTRINE OF FAIR NOTICE

The Eighth Circuit also overturned the regulation on the ground that "the rule impermissibly disregards two of the three statutory requirements that must be met before a state commission can terminate an exemption." Pet. App. A at 27a. Specifically, § 251(f) affords both rural LECs and small LECs two independent grounds, in addition to the "not unduly burdensome" ground, for opposing a § 251(c) request. For example, a rural LEC may defend its exemption on the ground that a request is not "technically feasible," and also that it is not "consistent with § 254 of this Title (other than subsections (b)(7) and (c)(1)(d) thereof)."[15]

Because the regulation states that a rural LEC, or a small LEC, "in order to justify continued exemption under [the statute] ... must offer evidence that the application of the requirements of § 251(c) ... would be likely to cause undue economic burden," the Eighth Circuit concluded that "a state commission looking at [the regulation] would

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[15] This third defense refers to certain of the statutory provisions governing the universal service obligation to be met for the rural LEC's "service area."

conclude that if a rural ILEC had failed to show the undue economic burden, the exemption must be terminated, regardless of the existence of the ILEC's companion defenses of technical infeasibility and/or inconsistency with [the universal service provisions.]" Pet. App. A at 27a. The Eighth Circuit held that "such a result represents an arbitrary and unreasonable interpretation of the government statute." *Id.*

The Eighth Circuit's decision went out of its way to reject the most natural reading of the regulation – namely, that the regulation only defines the showing an LEC must make if it wishes to rely on the undue economic burden criterion for exemption, suspension or modification, and does not preclude an LEC from relying on other statutory bases for exemption, suspension or modification in the absence of undue burden. Moreover, even if the language of the regulation left any doubt on this point, the FCC has been careful to prevent any misunderstanding by issuing a formal order clarifying that the regulation was *not* intended to foreclose reliance on other statutory grounds as an independent basis for exemption, suspension or modification even absent undue economic burden. *See supra* n.2.

The Eighth Circuit, however, held that the FCC's formal clarification of the scope of its regulation was to be wholly disregarded, because a state commission viewing the regulation wholly in isolation could read it as foreclosing the other statutory criteria. The Eighth Circuit's holding in this regard is directly contrary to settled, hornbook principles of administrative law establishing that an agency's public pronouncements of the scope of its regulation may be relied upon to clarify otherwise ambiguous provisions.

This doctrine is most prominently set forth in caselaw discussing the doctrine of "fair notice." As the D.C. Circuit has explained, the administrative law doctrine of fair notice "prevents ... deference from validating the application of a

regulation that fails to give fair warning of the conduct it prohibits or requires." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (*citing Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)). The fair notice doctrine, which "has [] been thoroughly 'incorporated into administrative law,'" *id.*, *quoting Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987),[16] recognizes that the text of a regulation itself is not the only source for determining whether parties receive fair notice of what the governing rule requires. For instance, courts have looked to other public statements issued by the agency to determine whether an agency has given fair notice. Specifically, "[i]f by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects the parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *See General Elec.*, 53 F.3d at 1329.

In this case, the Eighth Circuit's opinion admits that "the FCC stated in a later order that [the regulation] does not in any way affect a state's responsibility to consider all three of the factors set forth in § 251(f)(1)(A)" Pet. App. A at 27a, *quoting from In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 20166 at ¶ 15 (1996). This administrative adjudication is more than a mere "public statement"; it is an authoritative administrative interpretation of the regulation. "It is axiomatic that defects in the constitutional sufficiency of a regulatory warning can be cured by authoritative judicial or administrative interpretations which clarify obscurities or

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[16] *See also Rollins Envtl. Servs. v. EPA*, 937 F.2d 649, 654 n.1, 655 (D.C. Cir. 1991) (Edwards, J. dissenting in part and concurring in part) (principle is not constitutional but is "basic horn-book law in the administrative context" and a "simple principle of administrative law").

resolve ambiguities." *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1338 (6th Cir. 1978). Indeed, the Eighth Circuit's own ruling could qualify as an "authoritative judicial" clarification curing the regulation's deficiency. *See id; United States v. Southern Management Corp.*, 955 F.2d 914, 923 (4th Cir. 1992). ("Our ruling is fair notice regarding the ambit of the Act's coverage of drug addicts/abusers.").

Several other factors reinforce the adequacy of notice in this case. When administrative regulations are challenged on grounds of vagueness, the test for adequacy of notice depends in part on the nature of the enactment. One reason why less strict standards for vagueness apply to economic regulation is because "businesses, which face economic demands to plan carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Also, "the fact that the defendants were dealing in a highly regulated field reduces the fair notice concerns." *United States v. Drasen*, 845 F.2d 731, 738 (7th Cir. 1988) (citation omitted).

Applying these settled principles, it is apparent that the Eighth Circuit ruling is erroneous. It is implausible that any state commission in this country is likely ever to be composed of a group of officials, all of whom are so ill-prepared or incompetent that not one of them, or any member of their staff, would learn of the other two defenses. It is also implausible that the LECs, which operate in one of the most densely regulated areas of the economy, represented by members of trade associations and lawyers holding themselves out as qualified under their local ethical rules to practice in this area, would not find out on a timely basis that they have three defenses instead of one defense when new competitors come knocking on their door with their *bona fide* § 251(c) requests.

In sum, the administrative law doctrine of fair notice is, like most notice issues, a practical doctrine that must be applied in the real world in which the litigants and administrative/judicial adjudicators live. Again, the Eighth Circuit's opinion – as it did on all of the rural/small LEC issues – simply ignored that real world in favor or striking down the regulation.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX CONTENTS

APPENDIX A

Opinion, *Iowa Utilities Board et al. v. FCC*, 219 F.3d 744 (8th Cir. 2000) 1a-37a

APPENDIX B

Excerpts from *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98, 95-185 (Aug. 8, 1996)
¶¶ 1-40 & 1249-1278 ..... 38a-85a

APPENDIX C

47 U.S.C. § 251
47 U.S.C. § 252
47 U.S.C. § 253 ..... 86a-103a

APPENDIX D

47 CFR § 51.401
47 CFR § 51.403
47 CFR § 51.405 ..... 104a-105a

APPENDIX E

Iowa Utilities Board et al. v. FCC, Docket No. 96-3321 *et al.*, Order granting Motions to Intervene (8th Cir. October 10, 1996) 106a-117a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-3321 (and consolidated cases)

Iowa Utilities Board, et al., Petitioners, v. Federal Communications Commission and United States of America, Respondents.

219 F.3d 744

On Petitions for Review of an Order of the Federal Communications Commission

Submitted: September 17, 1999
Filed: July 18, 2000

Before WOLLMAN, Chief Judge, BOWMAN and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

These cases are before us on remand from the Supreme Court. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Local telephone service providers (known as "incumbent local exchange carriers" or "ILECs") and their industry associations petition for review of the First Report and Order[1] issued by the Federal Communications Commission (FCC) which contains the FCC's findings and

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[1] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (First Report and Order).

rules[2] pertaining to the local competition provisions of the Telecommunications Act of 1996[3] (the Act). The Act requires an ILEC to (1) permit requesting new entrants (competitors) in the ILEC's local market to interconnect with the ILEC's existing local network and, thereby, use that network to compete in providing local telephone service (interconnection); (2) provide its competitors with access to elements of the ILEC's own network on an unbundled basis (unbundled access); and (3) sell to its competitors, at wholesale rates, any telecommunications service that the ILEC provides to its customers at retail rates in order to allow the competing carriers to resell those services (resale). *See* 47 U.S.C. § 251(c)(2)-(4) (1994 ed., Supp. III).[4] Through this Act, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). Challenges to the First Report and Order were consolidated in this court.

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[2] The FCC's rules are codified in scattered sections of Title 47, Code of Federal Regulations. All references in this opinion to the Code of Federal Regulations are to the 1997 version.

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, United States Code).

[4] All references in this opinion to sections and subsections of the Telecommunications Act of 1996 in the United States Code are to the 1997 supplement unless otherwise indicated.

I. Background

We present a brief summary of the background of this case based upon the belief that all parties are familiar with the opinion of the Supreme Court as well as our prior opinion. In our prior opinion, *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997), we concluded, in relevant part, that (1) the FCC exceeded its jurisdiction in promulgating various pricing rules; (2) the FCC exceeded its jurisdiction in promulgating 47 C.F.R. § 51.405, regarding rural exemptions; (3) the FCC exceeded its jurisdiction in promulgating 47 C.F.R. § 51.303, regarding preexisting agreements; and (4) various unbundling rules, including the superior quality rules and the combination of network elements rule, were contrary to the Act.

The Supreme Court affirmed in part, reversed in part, and remanded. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Supreme Court reversed that part of our opinion pertaining to jurisdiction and held that the FCC had jurisdiction to (1) design a pricing methodology; (2) promulgate rules pertaining to rural exemptions; and (3) promulgate rules regarding preexisting agreements. The Supreme Court also reversed our decision to vacate 47 C.F.R. § 51.315(b). The Supreme Court did not address the part of our opinion vacating the superior quality rules, 47 C.F.R. §§ 51.305(a)(4) and 51.311(c), and the additional combination of network elements rule, 47 C.F.R. § 51.315(c)-(f).

On remand we must now review on the merits the FCC's forward-looking pricing methodology, proxy prices, and wholesale pricing provisions. The petitioners also request that the court vacate 47 C.F.R. § 51.317, regarding the identification of additional unbundled network elements, and that the court reaffirm its previous decision vacating the superior-quality rules and the additional combination of network elements rule. We also must review on the merits 47

C.F.R. § 51.405, regarding rural exemptions, and 47 C.F.R. § 51.303, pertaining to preexisting agreements.

II. Analysis

The United States Courts of Appeals have exclusive jurisdiction to review final orders of the FCC pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) (1994). In reviewing an agency's interpretation of a statute, we must defer to the agency only if its interpretation is consistent with the plain meaning of the statute or is a reasonable construction of an ambiguous statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). We will overturn an agency interpretation that conflicts with the plain meaning of the statute, *see id.*, is an unreasonable construction of an ambiguous statute, *see id.* at 844-45, or is arbitrary and capricious. *See* 5 U.S.C. § 706 (1994); *Chevron*, 467 U.S. at 844. In making our decision regarding reasonableness, the issue "is not whether the Commission made the best choice, or even the choice that this Court would have made, but rather 'whether the FCC made a reasonable selection from among the available alternatives.'" *Southwestern Bell Tel. Co. v. F.C. C.*, 153 F.3d 523, 559-60 (8th Cir. 1998) (quoting *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 413 (D. C. Cir. 1982).

A. Pricing Methodology

Congress established pricing standards for the rates that may be charged by ILECs to their new local service competitors for interconnection and for the furnishing of network elements on an unbundled basis. The statute, in relevant part, states:

(d) Pricing standards

(1) Interconnection and network element charges

> Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--
>
> (A) shall be--
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.

47 U.S.C. § 252(d)(1).

The FCC promulgated various pricing rules to implement the Act. The FCC's pricing provisions that pertain to the pricing of interconnection and network elements utilize a forward-looking economic cost methodology that is based on the total element long-run incremental cost (TELRIC) of the element. These costs are to be based on an ILEC's existing wire center locations using the most efficient technology available in the industry regardless of the technology actually used by the ILEC and furnished to the competitor. *See* First Report and Order ¶ 685. State commissions are to employ TELRIC to determine the price an ILEC may charge its competitors for the right to interconnect with the ILEC and/or to use the ILEC's network elements to compete with the ILEC in providing telephone services.

The petitioners contend the TELRIC method violates the plain language and purpose of the Act and represents arbitrary and capricious decision-making. The petitioners challenge TELRIC on four grounds.

1. Hypothetical Network Standard

In its First Report and Order, the FCC explained that forward-looking methodologies, like TELRIC, consider the costs that a carrier would incur in the future for providing the interconnection or unbundled access to its network elements. *See* First Report and Order ¶ 683. These costs either can be based on the most efficient network configuration and technology currently available, or on the ILEC's existing network infrastructures. *See id.* The FCC chose an approach which it says combined the two possibilities. *See id.* ¶ 685. Pursuant to § 252(d)(1), the FCC promulgated 47 C.F.R. § 51.505 entitled "Forward-looking economic cost." It states in part that "the total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." 47 C.F.R. § 51.505(b)(1). The only nonhypothetical factor in the calculation is the use of the actual location of the ILEC's existing wire centers.

The petitioners assert that the hypothetical network standard upon which TELRIC's costs are based is contrary to the Act's plain language. Section 252(d)(1)(A)(i) requires the just and reasonable rates for network elements to be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing *the* interconnection or network element." *Id.* (emphasis added). The petitioners contend the language points inescapably to the actual costs the ILEC incurs for furnishing its existing network to the competitor either through interconnection or on an unbundled network element basis. However, the petitioners explain that the costs under the FCC's pricing methodology are those costs that would be incurred by a hypothetical carrier deploying a hypothetical network that is optimally efficient in technology and configuration. The petitioners argue that the FCC's hypothetical network

standard does not reflect what they are statutorily required to furnish to their competitors and is, therefore, flatly contrary to the statute.

The respondents counter the petitioners' assertion that TELRIC costs are based on a hypothetical network. The respondents contend TELRIC does reflect the ILECs' costs but on a predictive forward-looking basis that assumes a reasonable level of efficiency. According to the respondents, setting rates based on the use of the most efficient technology available and on the lowest cost network configuration using existing wire center locations is consistent with the statute, promotes competition, and is a reasonable application of forward-looking costs.

The intervenors in support of the FCC (the intervenors) explain that costs should be based on what any firm, including the specific ILEC whose rates are to be set, would incur in providing the network elements today. They suggest these costs should be the replacement cost of the network using the technology available today and that no firm in a competitive market would charge rates based on the cost of reproducing obsolete technology. The intervenors contend that calculating the cost of old technology with current prices defeats the purpose of using a forward-looking methodology.

We agree with the petitioners that basing the allowable charges for the use of an ILEC's existing facilities and equipment (either through interconnection or the leasing of unbundled network elements) on what the costs would be if the ILEC provided the most efficient technology and in the most efficient configuration available today utilizing its existing wire center locations violates the plain meaning of the Act. It is clear from the language of the statute that Congress intended the rates to be "based on the cost ...of *providing the interconnection or network element*," *id.* (emphasis added), not on the cost some imaginary carrier would incur by providing the newest, most efficient, and

least cost substitute for the actual item or element which will be furnished by the existing ILEC pursuant to Congress's mandate for sharing. Congress was dealing with reality, not fantasizing about what might be. The reality is that Congress knew it was requiring the existing ILECs to share their existing facilities and equipment with new competitors as one of its chosen methods to bring competition to local telephone service, and it expressly said that the ILECs' costs of providing *those* facilities and *that* equipment were to be recoverable by just and reasonable rates. Congress did not expect a new competitor to pay rates for a "reconstructed local network," First Report and Order ¶ 685, but for the existing local network it would be using in an attempt to compete.

It is the cost to the ILEC of providing its existing facilities and equipment either through interconnection or by providing the specifically requested existing network elements that the competitor will in fact be obtaining for use that must be the basis for the charges. The new entrant competitor, in effect, piggybacks on the ILEC's existing facilities and equipment. It is the cost to the ILEC of providing that ride on those facilities that the statute permits the ILEC to recoup. This does not defeat the purpose of using a forward-looking methodology as the intervenors assert. Costs can be forward-looking in that they can be calculated to reflect what it will cost the ILEC in the future to furnish to the competitor those portions or capacities of the ILEC's facilities and equipment that the competitor will use including any system or component upgrading that the ILEC chooses to put in place for its own more efficient use. In our view it is the cost to the ILEC of carrying the extra burden of the competitor's traffic that Congress entitled the ILEC to recover, and to that extent, the FCC's use of an incremental cost approach does no violence to the statute. At bottom, however, Congress has made it clear that it is the cost of providing the actual facilities and equipment that will

be used by the competitor (and not some state of the art presently available technology ideally configured but neither deployed by the ILEC nor to be used by the competitor) which must be ascertained and determined.

Consequently, we vacate and remand to the FCC rule 51.505(b)(1).

2. Use of a Forward-looking Methodology

The petitioners contend that the FCC's use of its forward-looking TELRIC methodology, which denies the ILECs recovery of their historical costs, is contrary to the express terms of the Act and is unreasonable. The petitioners state that the term "cost" plainly refers to historical cost and that the juxtaposition of "cost" in § 252(d)(1)(A)(i) with "profit" in § 252(d)(1)(B) confirms this. They refer to the discussion of profit in paragraph 699 of the First Report and Order as support for their proposition that if profit must be read in an accounting sense, then so too must cost. In addition, they assert the FCC failed to provide an adequate explanation for its rejection of historical costs and that an agency is not allowed to change ratemaking methodologies without cogently explaining why the change is being made.

The respondents argue the term "cost" is an elastic term that can be construed to mean either historical or forward-looking costs and that the FCC's interpretation of cost as forward-looking is reasonable. They clarify the discussion in the First Report and Order regarding profit. They explain that the FCC found that a normal profit, which TELRIC is designed to yield, represents a "reasonable profit" within the meaning of the statute and that the FCC has not construed profit to mean accounting profit. The respondents also argue the FCC explained in detail its decision to use forward-looking costs and that the decision was reasonable based on the new competitive objectives of the 1996 Act. The intervenors agree with the respondents that the term "cost" imposes no clear limits on the FCC's authority to establish a

ratemaking methodology, and according to their argument, it is in these circumstances that an agency is entitled to deference.

We respectfully disagree with the petitioners' contention that cost, as it is used in the statute, means historical cost. The statute simply states that rates "shall be based on the cost ...of providing the interconnection or network element." 47 U.S.C. § 252(d)(1)(A). We conclude the term "cost," as it is used in the statute, is ambiguous, and Congress has not spoken directly on the meaning of the word in this context. We agree with the assessment that "the word 'cost' is a chameleon, capable of taking on different meanings, and shades of meaning, depending on the subject matter and the circumstances of each particular usage." *Strickland v. Commissioner, Maine Dept. of Human Servs.*, 48 F.3d 12, 19 (1st Cir. 1995), *cert. denied*, 516 U.S. 850 (1995).

The FCC has the authority to make rules to fill any gap in the Act left by Congress, provided the agency's construction of the statute is reasonable. *See Chevron*, 467 U.S. at 843. Likewise, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT & T Corp.*, 525 U.S. at 397 (citation to *Chevron* omitted). Forward-looking costs have been recognized as promoting a competitive environment which is one of the stated purposes of the Act. The Seventh Circuit, for example, explained, "[I]t is current and anticipated cost, rather than historical cost that is relevant to business decisions to enter markets ...historical costs associated with the plant already in place are essentially irrelevant to this decision since those costs are 'sunk' and unavoidable and are unaffected by the new production decision." *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1116-17 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983). Here, the FCC's use of a forward-looking cost methodology was reasonable. The FCC sought comment on the use of forward-looking costs and concluded

that forward-looking costs would best ensure efficient investment decisions and competitive entry. *See* First Report and Order ¶ 705. It is apparent that the FCC explained in detail its reason for selecting a forward-looking cost methodology to implement the new competitive goals of the Act, and any past rejection of forward-looking methodologies was made in a monopoly, rather than a competitive, environment. *See* First Report and Order ¶¶ 618-711.

Additionally, we are unpersuaded by the petitioners' discussion of the juxtaposition of the word "profit" with "cost" in the statute. The FCC did not interpret profit as accounting[5] profit as the petitioners contend. The First Report and Order discusses only two types of profit: economic[6] and normal.[7] *See* First Report and Order ¶ 699.

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[5] Accounting profit equals the difference between total revenue and explicit costs. Explicit costs are those costs incurred when a monetary payment is made. Accounting profit is typically higher than economic profit because accounting profit only subtracts explicit costs rather than the total opportunity costs. *See* ROGER A. ARNOLD, ECONOMICS 484-85 (2d ed. 1992).

[6] Economic profit equals the difference between total revenue and total opportunity cost, including both explicit and implicit costs. Implicit costs represent the value of resources used for which no monetary payment is made. *See id.* Economic profit is also referred to as supranormal profit. *See* First Report and Order ¶ 699.

[7] Normal profit is achieved when a company earns revenue that is equal to its total opportunity costs. This is the level of profit needed for a company to cover all of its opportunity costs. Normal profit is the same as zero economic profit. *See* ARNOLD, *supra* note 5, at 485.

The FCC interpreted the word "profit" in the statute to mean "normal profit." The FCC found that TELRIC provides for a "normal" profit and that level of profit is reasonable within the meaning of the statute. Section 252(d)(1)(B) states only that the rates paid for either interconnection or furnishing unbundled access "may include a reasonable profit." The use of the word "may" indicates that the inclusion of a reasonable profit is not mandatory but permitted. Additionally, nothing in the phrase "may include a reasonable profit" suggests "cost" must mean historical costs. A "profit" can be made whether a historical cost or forward-looking cost methodology is used. We reiterate that a forward-looking cost calculation methodology that is based on the incremental costs that an ILEC actually incurs or will incur in providing the interconnection to its network or the unbundled access to its specific network elements requested by a competitor will produce rates that comply with the statutory requirement of § 252(d)(1) that an ILEC recover its "cost" of providing the shared items.

3. Effect of Universal Service Subsidies

The petitioners submit that the failure to include the costs imposed by the government mandated subsidies in network element prices would frustrate the Act's objectives by forcing the ILECs to bear a disproportionate share of the universal service burdens. They explain that when an incumbent carrier provides to a competitor the network elements needed to serve a business customer, the costs to the incumbent not only include the costs of operating the particular network elements furnished but also the loss of that customer's contribution to support lower rates for others. The loss of that contribution, the petitioners argue, must be included in the determination of the rates charged the competitor for unbundled access to the ILEC's network elements.

The respondents and intervenors assert that allowing the ILECs to include the costs of universal service subsidies in

its rates would violate the Act. They argue § 252(d)(1) requires rates to reflect the costs of providing the network elements, not the costs of universal service subsidies. Including those costs, according to the respondents, would violate that section of the Act. The respondents cite two decisions in which we concluded that the costs of universal services subsidies should not be included in the costs of providing the network elements. *See Competitive Telecomms. Ass'n v. F.C.C.*, 117 F.3d 1068, 1074-75 (8th Cir. 1997); *Southwestern Bell Tel. Co.*, 153 F.3d at 540.

In accordance with our previous opinions, we maintain our view that the costs of universal service subsidies should not be included in the costs of providing the network elements. Section 252(d)(1)(A)(1) requires rates to be cost-based. Universal service charges are not based on the actual costs of providing interconnection or the requested network element. *See Competitive Telecomms.*, 117 F.3d at 1073. "Payment of cost-based rates represents full compensation to the incumbent LEC for use of the network elements that carriers purchase." *Southwestern Bell*, 153 F.3d at 540 (quoting *In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982 (1997) ¶ 337). Including the costs of universal service subsidies would allow for double recovery. *See id.*

4. Takings Argument

The petitioners contend the use of the TELRIC method to set rates raises a serious Fifth Amendment takings issue that the statute should be construed to avoid. The petitioners challenge the pricing rules as mandating invalid confiscatory rates. The petitioners insist the statute must be read so that an ILEC receives just and reasonable compensation in the constitutional sense for the services it provides to its competitors.

The respondents argue that the claim that the use of TELRIC will constitute a taking is not ripe for judicial consideration because, at this point, it is unknown whether the rates established under TELRIC will constitute just and reasonable compensation. In addition, the intervenors point out that TELRIC compensates the ILECs for the present market value of the property taken which is all that is constitutionally required for just and reasonable compensation.

Because we have vacated 47 C.F.R. § 51.505(b)(1), we have some doubt that we need to address the argument that TELRIC also violates the Constitution. Our remand to the FCC of the TELRIC rule should result in a new rule for determining the compensation that the ILECs will receive for the new competitor's use of the ILEC's property--a rule that should accurately determine the actual costs to the ILEC of furnishing its network (either by interconnection or on an unbundled element basis) to its competitors together with a permitted reasonable profit. Whether the new rule will result in rates that do not provide just and reasonable compensation cannot be foretold. However, in the event our view of TELRIC's statutory invalidity turns out to be incorrect, and to avoid as best we can another remand, we proceed further with the petitioners' constitutional assertions.

In our earlier opinion we determined that the ILECs' claims that the FCC's unbundling rules constituted an unconstitutional taking were not ripe for adjudication. *See Iowa Utils. Bd.*, 120 F.3d at 818. We did so principally on the basis that the rates for the unbundled access were to be set by the state commissions, that the actual rates were largely yet unknown, and that the Act provided for a mechanism (arbitration before the state commissions and review in federal district court) to determine what the just and reasonable rates would be in individual cases. That ripeness conclusion was not attacked in the Supreme Court. While we recognize that the argument made here (that

TELRIC itself, because it is based on a hypothetical network using the most efficient technology available which bears little or no resemblance to the ILEC's property which will be actually made available to competitors, must result in rates that are neither just nor reasonable, and confiscatory in the constitutional sense) is not the same one we addressed in our earlier opinion, we conclude for many of the same reasons we expressed before, *see id.*, that the present takings claim is not ripe for review.[8]

The Constitution protects public utilities from rates which are "so unjust as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). However, a takings claim cannot be based on the ratemaking methodology, but rather it must be based on the rate itself. "It is not theory but the impact of the rate order which counts." *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). Until the actual rates are established, we cannot conclude whether the impact of TELRIC driven rates will constitute a taking. "It is not enough that a party merely speculates that a government action will cause harm." *Alenco Communications, Inc. v. F.C.C.*, 201 F.3d 608, 624 (5th Cir. 2000). We do not need to disregard *Chevron* deference and interpret the statute in accordance with the petitioners' views in order to avoid an unconstitutional taking in this instance. The possibility that a regulatory program may result in a taking does not justify the use of a narrowing construction.

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[8] We note, with no small amount of interest, that the Supreme Court has granted certiorari to review the Fifth Circuit's decision in *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), where the Fifth Circuit noted that the use of a forward-looking cost model to determine universal service subsidies did not result in an unconstitutional taking. *GTE Service Corp. v. FCC*, 68 U.S.L.W. 3496 (U.S. June 5, 2000) (No. 99-1244).

See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128-29 (1985). In such circumstances, the adoption of a narrowing construction might frustrate a potentially permissible application of a statute. *See id.* at 128. Because the consequences of the FCC's choice to use TELRIC methodology cannot be known until the resulting rates have been determined and applied, the constitutional claim is not ripe. *See Duquesne*, 488 U.S. at 317 (Scalia, White, and O'Connor, JJ., concurring) (noting that the Constitution looks to the consequences produced rather than the technique employed).

B. Wholesale Rates

Section 252(d)(3) of the Act provides that state commissions "shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." Pursuant to this section, the FCC promulgated 47 C.F.R. § 51.607 which excludes "avoided retail costs" from wholesale rates. "Avoided retail costs" are defined by the FCC as "those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier." 47 C.F.R. § 51.609(b).

The petitioners challenge the FCC's interpretation of the term "avoided retail costs." The petitioners contend § 252(d)(3) plainly requires wholesale rates to reflect the ILECs' retail rates less those costs that an ILEC actually avoids when it loses its retail customers to a reselling competitor. However, under the FCC's definition of "avoided retail costs," the petitioners argue the FCC requires them to exclude all retailing costs rather than only those costs that an ILEC actually avoids. The petitioners state that many costs associated with retailing are fixed and will not begin to

decline initially nor will the costs decline proportionately to the number of customers lost to the reseller. The petitioners explain the phrase "will be avoided" in § 252(d)(3) means "actually avoided" because otherwise the wholesale discount given the reseller would be inflated.

The respondents counter that the phrase "will be avoided" is ambiguous and that the FCC reasonably interpreted the language of the statute. The intervenors explain that the ILECs avoid incurring any retailing costs when engaging in wholesale transactions, and even if certain retailing costs are fixed, the ILECs would still incur only those costs that arose in connection with the ILECs' retailing activities. The respondents state that making competitors pay for a portion of the ILECs' retailing costs, even though the new entrant is not the cause of those retail costs, would result in the new entrants subsidizing the ILECs' retail offerings while still having to pay the new entrants' own retailing costs.

We agree with the petitioners that the phrase "will be avoided" refers to those costs that the ILEC will actually avoid incurring in the future, because of its wholesale efforts, not costs that "can be avoided." The verb "will" is defined, in part, as "a word of certainty." BLACK'S LAW DICTIONARY 1598 (6th ed. 1990). Whereas, the verb "can" is "often used interchangeably with 'may,'" *id.* at 206, and may is a word "of speculation and uncertainty." *Id.* at 1598. The language of the statute is clear. Wholesale rates shall exclude "costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). The plain meaning of the statute is that costs that are actually avoided, not those that could be or might be avoided, should be excluded from the wholesale rates.

If the Congress had meant the standard to be one of reasonable avoidability, it could have easily said so. We note that Congress's starting point in § 252(d)(3) is the retail rates the ILEC charges its subscribers for the same service the

new competitor (who wants to enter the market by reselling) has requested be furnished to it. From those retail rates, the ILEC's costs that "will be avoided" by furnishing those services to the competitor are to be excluded. The statute recognizes that the ILEC will itself remain a retailer of telephone service with its own continuing costs of providing that retail telephone service. The FCC's rule treats the ILEC as if it were strictly a wholesaler whose sole business is to supply local telephone service in bulk to new purveyors of retail telephone service. Under the statute as it is written, it is only those continuing costs of providing retail telephone service which will be avoided by selling to the competitor the services it requests which are to be excluded. The FCC's rule is contrary to the statute.

Consequently, we vacate and remand rule 51.609.

C. Proxy Prices

The FCC established proxy prices to be used for interconnection and network element charges, wholesale rates, and the rates for termination and transport. The state commissions are to use these proxy prices if they do not use the provided ratemaking method to establish rates. The proxy prices consist of upper limits higher than which the rates set by the state commissions shall not go.

The petitioners argue the proxy prices should be vacated for three reasons. First, the petitioners state that the respondents expressly disavowed the proxy prices before the Supreme Court in order to support the FCC's position that it was not trying to set specific prices, but rather it was merely designing a pricing methodology. Therefore, the FCC, according to the petitioners, is judicially estopped from trying to revive the proxy prices now. Second, the petitioners contend the proxy prices should be vacated because they are based on the unlawful TELRIC method and employ the impermissible definition of "avoided retail costs." Third, the petitioners argue the proxy prices were developed using

unreliable cost models and, as a result, are arbitrary and capricious.

The respondents counter that the petitioners' challenge to the proxy prices is not subject to review because the proxy prices are not binding on the states. The respondents contend that states may elect to use the proxy prices, but the states are not required to use them. The respondents insist that this court has jurisdiction to review only final orders of the FCC, and the proxy prices are not final orders because they do not impose an obligation on the states. The intervenors add that substantial deference should be accorded to the FCC because the issue concerns interim relief, citing *Competitive Telecommunications Association v. F.C.C.*, 117 F.3d 1068, 1073-75 (8th Cir. 1997).

We agree with the petitioners that the respondents are estopped from trying to now revive the proxy prices. "The doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation." *Hossaini v. Western Missouri Med. Ctr.*, 140 F.3d 1140, 1142 (8th Cir. 1998). Judicial estoppel is invoked "to protect the integrity of the judicial process." *Id.* at 1143. The FCC represented to the Supreme Court that it was not establishing rates and depriving the state commissions of their role in implementing the Act. *See* Reply Br. for Federal Pet'rs at 7, *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 1998 WL 396961 (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141). The FCC emphasized that it was merely providing a methodology for state commissions to use in completing the "critical and complex task of determining the economic costs of an efficient telephone network." *Id.* The FCC dismissed the proxy prices as "designed for a past period in which no cost studies could have been made available to the state commissions. They have no relevance to this case." *Id.* at 7 n.5.

We are not persuaded by the FCC's explanation to this court of its position before the Supreme Court. The respondents explain that the proxy prices were not relevant to the ILECs' claim before the Supreme Court that the pricing rules intruded on the states' role in establishing rates because the proxy prices were optional. The First Report and Order very clearly commands the use of the proxy prices by directing that "a state commission *shall* use [default proxies] ...in the period before it applies the pricing methodology." First Report and Order ¶ 619 (emphasis added). Additionally, rule 51.503(b) states that the ILECs' rates for its elements "*shall* be established" using either TELRIC or the proxy prices. *See* 47 C.F.R. § 51.503(b) (emphasis added). The word "shall" is language of a mandatory nature. *Clark v. Brewer*, 776 F.2d 226, 230 (8th Cir. 1985). It is clear from the language of the First Report and Order, as well as the rules, that the state commissions are to use the proxy prices until the state commissions have established their own rates using the TELRIC method. The use of the proxy prices until such time is not optional.

The Supreme Court held that the FCC "has jurisdiction to design a pricing methodology." *AT & T Corp.*, 525 U.S. at 385. However, the FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to § 252(c)(2). Following the Supreme Court's opinion, we now agree with the FCC that its role is to resolve "general methodological issues," and it is the state commission's role to exercise its discretion in establishing rates. Br. for Federal Pet'rs at 26-27, *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), 1998 WL 396945 (No. 97-831).

The proxy prices are also infirm because they rely on the hypothetical most efficient carrier rationale which we have found to be violative of the Act, *ante* at 5-8, and because

they rely on the erroneous definition of "avoided retail costs."

We conclude the proxy prices cannot stand and, for the foregoing reasons, vacate rules 51.513, 51.611, and 51.707.

D. Unbundling Rules

The FCC issued numerous rules to implement the ILECs' duties to provide unbundled access to their network elements under subsection 251(c)(3). Many of these rules were previously challenged. In light of the Supreme Court's opinion, we revisit three of the unbundling rules.

1. Identification of Additional Unbundled Network Elements

The Supreme Court vacated 47 C.F.R. § 51.319 which required the ILECs to provide requesting carriers with unbundled access to a minimum of seven network elements so long as access was "necessary" and failure to provide the access would "impair" the competitors' ability to provide services. The Supreme Court vacated 47 C.F.R. § 51.319 because the FCC's interpretation of the "necessary" and "impair" standard was too broad and unreasonable. *See AT & T Corp.*, 525 U.S. at 388-92.

The ILECs request that we now vacate rule 51.317 because it utilizes the same "necessary" and "impair" standard of rule 51.319. The Supreme Court did not specifically address the validity of rule 51.317. This court previously upheld the "necessary" and "impair" standard, but we vacated the portion of rule 51.317 that created the presumption that a network element must be unbundled if it is technically feasible to do so.

The respondents concede that rule 51.317 must be remanded to the FCC as a result of the Supreme Court's opinion. *See* Resp'ts' Br. at 87 n.42. Therefore, we vacate rule 51.317 without any further discussion.

2. Superior Quality Rules

In our previous opinion, we vacated 47 C.F.R. §§ 51.305(a)(4) and 51.311(c), collectively known as the superior quality rules. These rules require an ILEC to provide, upon request, interconnection and unbundled network elements that are superior in quality to that which the ILEC provides to itself. The Supreme Court did not address these rules.

The petitioners ask us to reaffirm our previous decision vacating the superior quality rules. They contend the Supreme Court's decision did not affect our conclusion that the superior quality rules violated the Act because the FCC did not seek a review of our prior decision vacating these rules.

The respondents argue that the Supreme Court affirmed the FCC's general authority to adopt rules implementing the Act and that under this general authority the superior quality rules are valid. The intervenors agree and explain that because nothing in the Act forecloses the superior quality rules, the rules should be reinstated.

We again conclude the superior quality rules violate the plain language of the Act. We further conclude that nothing in 47 U.S.C. §§ 154(i), 201(b), or 303(r) gives the FCC the power to issue regulations contrary to the plain language of the Act. As we were correctly reminded at oral argument that this court is not a "super FCC," neither is the FCC an alter ego Congress free to change the words of a statute from "at least equal in quality" to "superior in quality" when it exercises its rule-making power. Subsection 251(c)(2)(C) requires the ILECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself ...." Nothing in the statute requires the ILECs to provide superior quality interconnection to its competitors. The phrase "at least equal in quality" establishes a minimum level for the quality of interconnection; it does not require

anything more. We maintain our view that the superior quality rules cannot stand in light of the plain language of the Act for all the reasons we previously expressed. *See Iowa Utils. Bd.*, 120 F.3d at 812-13. We also note that it is self-evident that the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of the interconnection provided.

3. Additional Combinations Rule

In our previous opinion, we also vacated 47 C.F.R. § 51.315(c)-(f), the additional combinations rule. This rule requires an ILEC to perform the functions necessary to combine unbundled network elements in any technically feasible manner. Although the Supreme Court reversed our decision to vacate 47 C.F.R. § 51.315(b), prohibiting the ILECs from separating requested network elements that are already combined, the Supreme Court did not address subsections (c)-(f).

The petitioners request that we reaffirm our prior decision vacating the additional combinations rule. The petitioners state that the Supreme Court's decision to reinstate 51.315(b) does not call into question this court's decision to vacate 51.315(c)-(f). The petitioners explain 51.315(b) is different because it prohibited ILECs from separating previously combined network elements over the objection of the requesting carrier. The additional combinations rule contained in subsections (c)-(f), on the other hand, requires the ILECs to combine their own network elements in new ways or with elements provided by the requesting carriers. They argue the additional combinations rule violates the Act.

In addition to the respondents' argument regarding the general rulemaking authority of the FCC, they assert this court's decision to vacate rules 51.315(c)-(f) was predicated on language rejected by the Supreme Court when it reinstated rule 51.315(b). In reinstating subsection (b), the Supreme Court emphasized the ambiguous nature of

§ 251(c)(3) regarding the separation of leased network elements. *See AT & T Corp.*, 525 U.S. at 395. Because of this ambiguity, the Supreme Court concluded, subsection (b) is rationally based on the nondiscrimination language in § 251(c)(3). *See id.* The respondents rely on the same nondiscrimination language to support subsections (c)-(f) because without these subsections, they argue, new entrants would incur higher costs for unbundled network elements than the ILECs incur. The intervenors agree that the policy concerns of ensuring against an anticompetitive practice not only support 47 C.F.R. § 51.315(b) but also subsections (c)-(f).

We are not persuaded by the respondents' contention that the Supreme Court's reinstatement of rule 51.315(b) affects our decision to vacate subsections (c)-(f). Nor do we agree with the Ninth Circuit that the Supreme Court's opinion undermined our rationale for invalidating the additional combinations rule. *See U.S. West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3669 (U.S. June 29, 2000) (No. 99-1641). The Ninth Circuit misinterpreted our decision to vacate subsections (c)-(f). We did not, as the Ninth Circuit suggests, employ the same rationale for invalidating subsections (c)-(f) as we did in invalidating subsection (b). *See MCI Telecomms. v. U.S. West*, 204 F.3d 1262, 1268 (9th Cir. 2000) (" The Eighth Circuit invalidated Rules 315(c)-(f) using the same rationale it employed to invalidate Rule 315(b). That is, the Eighth Circuit concluded that requiring combination was inconsistent with the meaning of the Act because the Act calls for 'unbundled' access.") Rather, the issue we addressed in subsections (c)-(f) was *who* shall be required to do the combining, not whether the Act prohibited the combination of network elements. *See Iowa Utils. Bd.*, 120 F.3d at 813.

Rule 51.315(b) prohibits the ILECs from separating previously combined network elements before leasing the

elements to competitors. The Supreme Court held that 51.315(b) is rational because "[section] 251(c)(3) of the Act is ambiguous on whether leased network elements may or must be separated." *AT & T Corp.*, 525 U.S. at 395. Therefore, under the second prong of *Chevron*, the Supreme Court concluded 51.315(b) was a reasonable interpretation of an ambiguous statute.

Unlike 51.315(b), subsections (c)-(f) pertain to the combination of network elements. Section 251(c)(3) specifically addresses the combination of network elements. It states, in part, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunication service." Here, Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall "combine such elements." It is not the duty of the ILECs to "perform the functions necessary to combine unbundled network elements in any manner" as required by the FCC's rule. *See* 47 C.F.R. § 51.315(c). We reiterate what we said in our prior opinion: "The Act does not require the incumbent LECs to do *all* the work." *Iowa Utils. Bd.*, 120 F.3d at 813. Under the first prong of *Chevron*, subsections (c)-(f) violate the plain language of the statute. We are convinced that rules 51.315(c)-(f) must remain vacated.

E. Rural Exemptions

Congress enacted § 251(f) to relieve the small and rural ILECs from some of the obligations imposed by other subsections of § 251. The FCC promulgated 47 C.F.R. § 51.405 to establish standards that the state commissions must follow in determining whether the small and rural ILECs are entitled to the exemption, suspensions, or modifications set forth in § 251(f).

The petitioners contend rule 51.405 cannot be reconciled with the language of the statute. They challenge the rule on three grounds. First, they argue the rule eliminates two of the three prerequisites that must be satisfied before a state commission may terminate an exemption. Second, they disagree with the limitation the rule places on the statutory phrase "unduly economically burdensome." Third, they suggest that the rule impermissibly shifts the burden of proof in exemption proceedings.

1. Prerequisites for Terminating an Exemption

Section 251(f)(1)(A) explains that a state commission may terminate an exemption for a rural telephone company if a request for interconnection, services, or network elements "is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof)." The FCC promulgated 47 C.F.R. § 51.405 pursuant to § 251(f). The rule requires the ILECs to offer evidence that the application of the requirements under § 251(c) "would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry" in order to justify exemption. 47 C.F.R. § 51.405(c).

The petitioners contend the rule is invalid because it alters the statutorily-mandated criteria that must be met in order for a state commission to terminate a rural ILEC's exemption. The petitioners point out that rule 51.405 refers only to the "unduly economically burdensome" prerequisite for termination rather than the above-mentioned three criteria.

The respondents argue that the rule does not eliminate any statutory criteria regarding rural exemptions. The respondents explain it was not the FCC's intent, nor was it within the FCC's power, to eliminate any statutory requirements. The respondents suggest that state commissions will look to the statute itself, in addition to the FCC's rule, when implementing § 251(f). They further claim

that the FCC has stated in a later order that rule 51.405(c) "does not in any way affect a state's responsibility to consider all three of the factors set forth in section 251(f)(1)(A)," citing to an order entered when the Rural Telephone Coalition sought a stay of rule 51.405(c). *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 20166 (1996) ¶ 15.

We agree with the petitioners that the rule impermissibly disregards two of the three statutory requirements that must be met before a state commission can terminate an exemption. A state commission looking at rule 51.405(c) would conclude that if a rural ILEC had failed to show an undue economic burden, the exemption must be terminated, regardless of the existence of the ILEC's companion defenses of technical infeasibility and/or inconsistency with § 254 of the Act. A rule that permits such a result represents an arbitrary and unreasonable interpretation of the governing statute.

2. Undue Economic Burden

Rule 51.405 also refers to the statutory requirement that a request for interconnection, unbundled elements, or retail services for resale must not cause an undue economic burden in order to justify termination of an exemption under § 251(f)(1) or to justify the denial of a petition for suspension or modification under § 251(f)(2). The rule interprets the statutory phrase "unduly economically burdensome" as "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c),(d).

The petitioners argue that the rule's interpretation of the statutory language is unreasonable because it does not allow state commissions to consider the total actual economic burden that competitive entry could impose on a small or rural ILEC. The petitioners explain that the phrase "unduly

economically burdensome" indicates Congress intended state commissions to consider any type of economic burden that might be imposed by such a request, including those burdens associated with efficient entry.

The respondents assert that the FCC interpreted "unduly economically burdensome" to refer to something more than the economic burden that commonly or ordinarily occurs upon efficient competitive entry because otherwise exemption, suspension, or modification would be virtually automatic. The respondents submit that Congress did not intend to preclude competitive entry into small or rural markets; rather Congress intended to protect the small or rural ILECs from only those § 251(b) or § 251(c) requirements that might be unfair or inappropriate.

We agree with the petitioners that the FCC has unreasonably interpreted the phrase "unduly economically burdensome." We owe no deference to an agency's interpretation that would "frustrate the congressional policy underlying a statute." *Bureau of ATF v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965)). In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the congressional debates. See 142 CONG. REC. S687-01 (Feb. 1, 1996) (statements by Sen. Hollings and Sen. Burns); 142 CONG. REC. H1145-06 (Feb. 1, 1996) (statement by Rep. Orton). It is clear that Congress intended that all Americans, including those in sparsely settled areas served by small telephone companies, should share the benefit of the lower cost of competitive telephone service and the benefits of new telephone technologies, which the Act was designed to provide. It is also clear that Congress exempted the rural ILECs from the interconnection, unbundled access to network elements, and resale obligations imposed by § 251(c), unless and until a state commission found that a request by a new entrant that the ILEC furnish it any of § 251(c) 's methods to compete in

the rural ILEC's market is (1) not unduly economically burdensome, (2) technically feasible, and (3) consistent with § 254. *See* 47 U.S.C. § 251(f)(1). Likewise, Congress provided for the granting of a petition for suspension or modification of the application of the requirements of § 251(b) or (c) if a state commission determined that such suspension or modification is necessary to avoid (1) a significant adverse economic impact, (2) imposing a requirement that is unduly economically burdensome, and (3) imposing a requirement that is technically infeasible; and is consistent with the public interest, convenience, and necessity. *See* 47 U.S.C. § 251(f)(2).

There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in § 251(b) or § 251(c). Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily-granted exemption from doing so should continue unless the state commission found all three prerequisites for terminating the exemption, or determined that all prerequisites for suspension or modification were met in order to grant an ILEC affirmative relief. It is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission. The FCC's elimination from that assessment of the "economic burden that is typically associated with efficient competitive entry" substantially alters the requirement Congress established. By limiting the phrase "unduly economically burdensome" to exclude economic burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. We have found no indication that Congress intended such a cramped reading of the phrase. If Congress had wanted the state commissions to consider only that economic burden which is

in excess of the burden ordinarily imposed on a small or rural ILEC by a competitor's requested efficient entry, it could easily have said so. Instead, its chosen language looks to the whole of the economic burden the request imposes, not just a discrete part.

Nor do we think the consideration of the whole economic burden occasioned by the request will result in state commissions "automatically" continuing the exemption, or "automatically" granting a petition for suspension or modification. In making their determination of "unduly economically burdensome," the state commissions will undoubtedly take into their judgment the fact that the ILEC will be paid for the cost of meeting the request and may also receive a reasonable profit pursuant to § 252(d). Subsections (c) and (d) of rule 51.405 are an unreasonable interpretation of the statute's requirement that a § 251(b) or § 251(c) request made by a competitor must not be "unduly economically burdensome" to the small or rural ILEC.

3. Burden of Proof

Rule 51.405 also requires the rural ILEC to offer evidence to the state commission to prove that it is entitled to a continuing exemption. The rule states, "Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that the rural telephone company should be entitled, pursuant to section 251(f)(1) of the Act, to continued exemption from the requirements of section 251(c) of the Act." 47 C.F.R. § 51.405(a).

The petitioners contend the FCC has improperly placed the burden of justifying a continued exemption on the ILECs. The petitioners discuss the language in 47 U.S.C. § 251(f)(1)(A), which states "subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements ...." This

language, they explain, indicates that the ILECs are automatically exempt from subsection (c) until a request has been made, and once a request is made, the burden is on the party making the request to prove that the request is not unduly economically burdensome, is technically feasible, and is consistent with § 254. They also assert the burden of proof lies with the proponent of the order according to the Administrative Procedure Act. *See* 5 U.S.C. § 556(d) (1994).

The respondents argue it was reasonable to place the burden on the rural ILECs because the default rule is for the state commission to deny the exemption unless the state commission affirmatively finds a reason to continue the exemption. The respondents rely on the Senate conference report on the Act which explains that a state commission must rule on the continuation of an exemption within 120 days, "and, if no exemption is granted," then the state commission must establish a schedule for compliance. S. CONF. REP. NO. 104-230, at 122 (1996). The respondents emphasize the word "granted" implies that a state commission will only grant an exemption if there is a specific reason to do so.

We agree with the petitioners that the rule impermissibly places the burden of proof on the ILECs. The statute states that the requirements of § 251(c) "shall not apply to a rural telephone company *until*" a request has been made. 47 U.S.C. § 251(f)(1)(A) (emphasis added). The use of the word "until" suggests that the rural telephone companies have a continuing exemption that is only terminated once a bona fide request is made, provided the request is not unduly economically burdensome, is technically feasible, and is consistent with § 254. Although the conference report refers to state commissions granting an exemption, the language of a conference report does not trump the language of a statute. *See Sierra Club v. Clark*, 755 F.2d 608, 615 (8th Cir. 1985). The language of the statute uses the word "terminate" not "grant." *See* 47 U.S.C. § 251(f)(1)(B). The plain meaning of

the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.

For the foregoing reasons, we vacate rule 51.405(a), (c), and (d).

F. Preexisting Agreements

Congress enacted § 252 of the Act to establish procedures for state commissions to approve agreements between ILECs and competing telecommunication carriers arrived at through negotiation or arbitration. Section 252(a) requires agreements entered into pursuant to § 251(c)(1)'s duty to negotiate to be submitted to the state commissions for approval. Section 252(a)(1) states:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

The FCC promulgated 47 C.F.R. § 51.303 which requires all interconnection[9] agreements, even those that predate the

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[9] We note that the term "interconnection" has been defined by the FCC as "the physical linking of two networks for the mutual exchange of traffic." First Report and Order ¶ 26.

1996 Act, to be submitted to the state commissions for approval. The rule states, "All interconnection agreements between an incumbent LEC and a telecommunications carrier, including those negotiated before February 8, 1996, shall be submitted by the parties to the appropriate state commission for approval ...." 47 C.F.R. § 51.303(a).

The petitioners argue that the rule violates the explicit language of the Act because, while the Act references agreements entered into pursuant to § 251, the rule applies to *all* agreements, even those entered into years before the Act was passed. The petitioners explain that agreements negotiated and entered into pre-1996 could not have been entered into "pursuant to section 251" because § 251 did not exist at that time, and therefore, only agreements that were either negotiated before the Act and formally entered into after the Act, or agreements that were both negotiated and formally entered into after the Act, must be submitted for approval.

The respondents contend that the agreement referred to in the third sentence of § 252(a)(1) is not limited to the agreement mentioned in the first and second sentences. The first and second sentences, they argue, refer to agreements reached pursuant to § 251, while the agreement mentioned in the third sentence refers to all, including pre-Act, agreements. The respondents explain that the term "negotiated" in the phrase set off by commas in the third sentence means a completed negotiation or, in other words, a negotiation that has resulted in a completed interconnection agreement.

We agree with the petitioners that the rule is contrary to the language of the Act. The respondents attempt to isolate the third sentence of § 252(a)(1) from the prior two sentences. The FCC concluded "that the final sentence of section 252(a)(1), which requires that *any* interconnection agreement must be submitted to the state commissions, can and should

be read to be independent of the prior sentences in section 252(a)(1)." First Report and Order ¶ 166. This is not a proper construction because "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 455 (1993).

The subsection in question begins by making reference to a competitor's "request ...pursuant to section 251." Upon receiving such a request, the competitor and the ILEC "may negotiate and enter into a binding agreement" without regard for the interconnection and unbundled network element access standards of § 251(b) and (c). The second sentence requires that the agreement so negotiated and entered into contain a detailed schedule of itemized charges for the items covered by the "agreement." The third sentence begins with the words, "[t]he agreement" (which can only mean the same agreement authorized by the first sentence and referred to in the second sentence) and requires that it be submitted to the state commission for approval pursuant to subsection (e).

The phrase in the third sentence set off by commas, which reads, "including any interconnection agreement negotiated before February 8, 1996," serves as the co-subject of the verb form "shall be submitted" and explains and defines what else besides the "agreement" mentioned in the first two sentences of the section must be submitted to the state commission. The "what else" that must be submitted to the state commission for approval is any interconnection agreement "negotiated" before February 8, 1996.

Congress was aware that many states were already exploring and experimenting with ways to open up local telephone markets to competition, and that telephone carriers were involved with each other in negotiations for those purposes prior to and at the time of the Act's passage. *See, e.g.*, S. REP. NO. 104-23, at 5 (1995). By using the phrase

"including any interconnection agreement negotiated before February 8, 1996," Congress brought within the sphere of required state commission approval all interconnection agreements entered into after February 8, 1996, including specifically those whose terms were arrived at by negotiation prior to that date but which had not yet been formally entered into by the parties. Because that unique group of interconnection agreements (those that were negotiated before but not yet entered into by February 8, 1996) could not have been agreements prompted or originated by either a request made under the Act or by the duty to negotiate contained in the Act (as the Act was not yet in existence at the time they were being negotiated), they could not be an "agreement" covered by the first two sentences and the first two words of the third sentence of § 252(a)(1). Nevertheless, because their subject matter, interconnection, was one which the Act was intended to compel, and because they would be entered into after the effective date of the Act, it was logical for Congress to want them subject to the Act's provisions. The use of the statutory language "including any interconnection agreement negotiated before February 8, 1996" also eliminated any argument that the agreeing carriers could have made in order to avoid state commission approval that their agreement had been negotiated before the Act's date and, therefore, was not subject to it.

We also think it of some significance that Congress intentionally used both the terms "negotiate" and "enter into" in the first sentence of § 252(a)(1) but only used the verb "negotiated" in the third sentence. Had Congress wanted to include all interconnection agreements that had been both negotiated and entered into before the Act's effective date within the scope of the third sentence, all it had to do was use the same words it had used in the first sentence. *See Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325, 1333 n.9 (8th Cir. 1985) ("'When the same word or phrase is used in the same section of an act more than once, and the meaning is

clear as used in one place, it will be construed to have the same meaning in the next place. '") (quoting *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir.), *cert. denied*, 436 U.S. 930 (1978)). It did not, and its choice not to do so reinforces our conclusion that Congress did not intend to do so. *See, e.g., Johnson v. United States*, 120 S. Ct. 1795, 1803 (2000) (When Congress means the same consequences, it is "natural for Congress to write in like terms.").

Across the country there were thousands of interconnection agreements existing between and among ILECs before the Act was passed. In Wisconsin alone the state commission estimated that there were over 3,000 pre-Act agreements which, under the FCC's construction of § 252, would now have to be submitted for approval. *See* Addendum to Br. of Pet'rs United States Telephone Ass'n et al. at 9. Many of those agreements were between neighboring noncompeting ILECs for the exchange of features and functions. There is no indication that Congress intended the state commissions to go back through years of agreements and approve or disapprove them. We conclude that Congress knew it was already giving the state commissions a huge amount of new work to do in arbitrating and approving the new agreements that would quickly be coming into being by virtue of the substantive provisions of the Act, and that it did not intend to add an even heavier burden by forcing the state commissions to replow old ground. The FCC's construction of the statute is unreasonable.

We further find it difficult to square the FCC's interpretation with the recognized presumption against retroactive legislation. By construing the word "negotiated" in the third sentence to mean "negotiated and entered into," the FCC's rule reaches back and requires something that the parties to the preexisting agreement had no reason to expect--required state commission approval under new and different standards which affect the rights the parties had at the time they entered into their agreement. *See Landgraf v. USI Film*

Prods., 511 U.S. 244, 280 (1994). Here again Congress's choice not to use the words "entered into" in the third sentence tells us that Congress did not intend the retroactive effect the FCC has given to the Act. Absent clear Congressional intent for retroactive effect, there should be none. *See id.* By making the Act applicable to interconnection agreements that were only negotiated before the Act's effective date (but not yet entered into), Congress gave the parties the option of either proceeding to enter into the negotiated agreement with the knowledge it would have to be submitted to the state commission for approval, or not. In so doing, an unwanted retroactive effect can be avoided, the parties can proceed knowing what the law will be, and the effect of the Act is entirely prospective.

We hold that § 252(a)(1) applies to any agreement which was either (1) both negotiated and entered into pursuant to § 251 after the Act went into effect or (2) is an interconnection agreement that was negotiated before, but not yet entered into when, the Act went into effect.

Consequently, we vacate rule 51.303.

III. Conclusion

We grant the pending petitions for review in part. For the reasons stated, we vacate, in total, 47 C.F.R. §§ 51.505(b)(1), 51.609, 51.513, 51.611, 51.707, 51.317, 51.405(a),(c), and (d), and 51.303. We remain firm in our previous decision to vacate 47 C.F.R. §§ 51.305(a)(4) and 51.311(c) (the superior quality rules) and 47 C.F.R. § 51.315(c)-(f) (the additional combinations rule). In all other respects, we deny the petitions for review.

APPENDIX B

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers

CC Docket No. 96-98; CC Docket No. 95-185

FEDERAL COMMUNICATIONS COMMISSION

11 FCC Rcd 15499

RELEASE-NUMBER: FCC 96-325

August 8, 1996 Released; Adopted August 1, 1996

FIRST REPORT AND ORDER

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

I. INTRODUCTION, OVERVIEW, AND EXECUTIVE SUMMARY

A. The Telecommunications Act of 1996 - A New Direction

1. The Telecommunications Act of 1996[1] fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to be codified at *47 U.S.C. §§ 151* et. seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in the United States Code.

consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition.

2. The 1996 Act also recasts the relationship between the FCC and state commissions responsible for regulating telecommunications services. Until now, we and our state counterparts generally have regulated the jurisdictional segments of this industry assigned to each of us by the Communications Act of 1934. The 1996 Act forges a new partnership between state and federal regulators. This arrangement is far better suited to the coming world of competition in which historical regulatory distinctions are supplanted by competitive forces. As this Order demonstrates, we have benefitted enormously from the expertise and experience that the state commissioners and their staffs have contributed to these discussions. We look forward to the continuation of that cooperative working relationship in the coming months as each of us carries out the role assigned by the 1996 Act.

3. Three principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition. In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only

statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in all telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.

4. These three goals are integrally related. Indeed, the relationship between fostering competition in local telecommunications markets and promoting greater competition in the long distance market is fundamental to the 1996 Act. Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of local services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition. Under section 251, incumbent local exchange carriers (LECs), including the Bell Operating Companies (BOCs), are mandated to take several steps to open their networks to competition, including providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold. Under section 271, once the BOCs have taken the necessary steps, they are allowed to offer long distance service in areas where they provide local telephone service, if we find that entry meets the specific statutory requirements and is consistent with the public interest. Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American

consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.

5. The Act also recognizes, however, that universal service cannot be maintained without reform of the current subsidy system. The current universal service system is a patchwork quilt of implicit and explicit subsidies. These subsidies are intended to promote telephone subscribership, yet they do so at the expense of deterring or distorting competition. Some policies that traditionally have been justified on universal service considerations place competitors at a disadvantage. Other universal service policies place the incumbent LECs at a competitive disadvantage. For example, LECs are required to charge interexchange carriers a Carrier Common Line charge for every minute of interstate traffic that any of their customers send or receive. This exposes LECs to competition from competitive access providers, which are not subject to this cost burden. Hence, section 254 of the Act requires the Commission, working with the states and consumer advocates through a Federal/State Joint Board, to revamp the methods by which universal service payments are collected and disbursed.[2] The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.

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[2] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93 (rel. Mar. 8, 1996) (Universal Service NPRM).

B. The Competition Trilogy: Section 251, Universal Service Reform and Access Charge Reform

6. The rules that we adopt to implement the local competition provisions of the 1996 Act represent only one part of a trilogy. In this Report and Order, we adopt initial rules designed to accomplish the first of the goals outlined above -- opening the local exchange and exchange access markets to competition. The steps we take today are the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252. Given the dynamic nature of telecommunications technology and markets, it will be necessary over time to review proactively and adjust these rules to ensure both that the statute's mandate of competition is effectuated and enforced, and that regulatory burdens are lifted as soon as competition eliminates the need for them. Efforts to review and revise these rules will be guided by the experience of states in their initial implementation efforts.

7. The second part of the trilogy is universal service reform. In early November, the Federal/State Universal Service Joint Board, including three members of this Commission, will make its recommendations to the Commission. These recommendations will serve as the cornerstone of universal service reform. The Commission will act on the Joint Board's recommendations and adopt universal service rules not later than May 8, 1997, and, we hope, even earlier. Our universal service reform order, consistent with section 254, will rework the subsidy system to guarantee affordable service to all Americans in an era in which competition will be the driving force in telecommunications. By reforming the collection and distribution of universal service funds, the states and the Commission will also ensure that the goals of affordable service and access to advanced services are met by means that enhance, rather than distort, competition. Universal service reform is vitally connected to the local competition rules we adopt today.

8. The third part of the trilogy is access charge reform. It is widely recognized that, because a competitive market drives prices to cost, a system of charges which includes non-cost based components is inherently unstable and unsustainable. It also well-recognized that access charge reform is intensely interrelated with the local competition rules of section 251 and the reform of universal service. We will complete access reform before or concurrently with a final order on universal service.

9. Only when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished. Only when our counterparts at the state level complete implementing and supplementing these rules will the complete blueprint for competition be in place. Completion of the trilogy, coupled with the reduction in burdensome and inefficient regulation we have undertaken pursuant to other provisions of the 1996 Act, will unleash marketplace forces that will fuel economic growth. Until then, incumbents and new entrants must undergo a transition process toward fully competitive markets. We will, however, act quickly to complete the three essential rulemakings. We intend to issue a notice of proposed rulemaking in 1996 and to complete the access charge reform proceeding concurrently with the statutory deadline established for the section 254 rulemaking. This timetable will ensure that actions taken by the Joint Board in November and this Commission by not later than May 1997 in the universal service reform proceeding will be coordinated with the access reform docket.

C. Economic Barriers

10. As we pointed out in our Notice of Proposed Rulemaking in this docket,[3] the removal of statutory and regulatory

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[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC

barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers.[4] Furthermore, absent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. Because an incumbent LEC currently serves virtually all subscribers in its local serving area,[5] an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.

11. Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the monopolized local market must be removed. The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly. As we pointed out in our NPRM, the local competition provisions of the Act require that these economies be shared with entrants. We believe they should be shared in a way that permits the incumbent

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Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. Apr. 19, 1996), *61 Fed. Reg. 18311* (Apr. 25, 1996) (NPRM).

[4] See NPRM at para. 6.

[5] See NPRM at n.13.

LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices.[6] Congress also recognized that the transition to competition presents special considerations in markets served by smaller telephone companies, especially in rural areas.[7] We are mindful of these considerations, and know that they will be taken into account by state commissions as well.

12. The Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each. We anticipate that some new entrants will follow multiple paths of entry as market conditions and access to capital permit. Some may enter by relying at first entirely on resale of the incumbent's services and then gradually deploying their own facilities. This strategy was employed successfully by MCI and Sprint in the interexchange market during the 1970's and 1980's. Others may use a combination of entry strategies simultaneously -- whether in the same geographic market or in different ones. Some competitors may use unbundled network elements in combination with their own facilities to serve densely populated sections of an incumbent LEC's service territory, while using resold services to reach customers in less densely populated areas. Still other new entrants may pursue a single entry strategy that does not vary by geographic region or over time. Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to

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[6] See NPRM at paras. 10-12.

[7] 47 U.S.C. § 251(f).

indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored. As to success or failure, we look to the market, not to regulation, for the answer.

13. We note that an entrant, such as a cable company, that constructs its own network will not necessarily need the services or facilities of an incumbent LEC to enable its own subscribers to communicate with each other. A firm adopting this entry strategy, however, still will need an agreement with the incumbent LEC to enable the entrant's customers to place calls to and receive calls from the incumbent LEC's subscribers.[8] Sections 251(b)(5) and (c)(2) require incumbent LECs to enter into such agreements on just, reasonable, and nondiscriminatory terms and to transport and terminate traffic originating on another carrier's network under reciprocal compensation arrangements. In this item, we adopt rules for states to apply in implementing these mandates of section 251 in their arbitration of interconnection disputes, as well as their review of such arbitrated arrangements, or a BOC's statement of generally available terms. We believe that our rules will assist the states in carrying out their responsibilities under the 1996 Act, thereby furthering the Act's goals of fostering prompt, efficient, competitive entry.

14. We also note that many new entrants will not have fully constructed their local networks when they begin to offer service.[9] Although they may provide some of their own facilities, these new entrants will be unable to reach all of

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[8] See infra, Section IV.A.

[9] Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") at 121.

their customers without depending on the incumbent's facilities. Hence, in addition to an arrangement for terminating traffic on the incumbent LEC's network, entrants will likely need agreements that enable them to obtain wholesale prices for services they wish to sell at retail and to use at least some portions of the incumbents' facilities, such as local loops and end office switching facilities. .

15. Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. The statute addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be "just, reasonable and nondiscriminatory."[10] We adopt rules herein to implement these requirements of section 251(c)(3).

D. Operational Barriers

16. The statute also directs us to remove the existing operational barriers to entering the local market. Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. Our recently-issued number portability Report and Order addressed one of the most significant operational barriers to competition by permitting

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[10] See 47 U.S.C. § 251(c)(3)

customers to retain their phone numbers when they change local carriers.[11]

17. Closely related to number portability is dialing parity, which we address in a companion order.[12] Dialing parity enables a customer of a new entrant to dial others with the convenience an incumbent provides, regardless of which carrier the customer has chosen as the local service provider. The history of competition in the interexchange market illustrates the critical importance of dialing parity to the successful introduction of competition in telecommunications markets. Equal access enabled customers of non-AT&T providers to enjoy the same convenience of dialing "1" plus the called party's number that AT&T customers had. Prior to equal access, subscribers to interexchange carriers (IXCs) other than AT&T often were required to dial more than 20 digits to place an interstate long-distance call. Industry data show that, after equal access was deployed throughout the country, the number of customers using MCI and other long-distance carriers increased significantly.[13] Thus, we believe that equal

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[11] Telephone Number Portability, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-286 (rel. July 2, 1996) (Number Portability Order). Consistent with the 1996 Act, *47 U.S.C. § 251*(b)(2), we required LECs to implement interim and long-term measures to ensure that customers can change their local service providers without having to change their phone number. Number portability promotes competition by making it less expensive and less disruptive for a customer to switch providers, thus freeing the customer to choose the local provider that offers the best value.

[12] NPRM paras. 202-219.

[13] Federal Communications Commission, STATISTICS OF COMMUNICATIONS COMMON

access had a substantial pro-competitive impact. Dialing parity should have the same effect.

18. This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets. As an example, customers can voluntarily switch from one interexchange carrier to another extremely rapidly, through automated systems. This has been a boon to competition in the interexchange market. We expect that moving customers from one local carrier to another rapidly will be essential to fair local competition.

19. As competition in the local exchange market emerges, operational issues may be among the most difficult for the parties to resolve. Thus, we recognize that, along with the state commissions and the courts, we will be called upon to enforce provisions of arbitrated agreements and our rules relating to these operational barriers to entry. Because of the critical importance of eliminating these barriers to the accomplishment of the Act's pro-competitive objectives, we intend to enforce our rules in a manner that is swift, sure, and effective. To this end we will review, with the states, our enforcement techniques during the fourth quarter of 1996.

20. We recognize that during the transition from monopoly to competition it is vital that we and the states vigilantly and vigorously enforce the rules that we adopt today and that will be adopted in the future to open local markets to competition. If we fail to meet that responsibility, the actions

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CARRIERS 1994-95, at 344, Table 8.8; Federal Communications Commission, REPORT ON LONG DISTANCE MARKET SHARE, Second Quarter 1995, at 14, table 6 (Oct. 1995).

that we take today to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective.

E. Transition

21. We consider it vitally important to establish a "pro-competitive, deregulatory national policy framework"[14] for local telephony competition, but we are acutely mindful of existing common carrier arrangements, relationships, and expectations, particularly those that affect incumbent LECs. In light of the timing issues described above, we think it wise to provide some appropriate transitions.

22. In this regard, this Order sets minimum, uniform, national rules, but also relies heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets. On those issues where the need to create a factual record distinct to a state or to balance unique local considerations is material, we ask the states to develop their own rules that are consistent with general guidance contained herein. The states will do so in rulemakings and in arbitrating interconnection arrangements. On other issues, particularly those related to pricing, we facilitate the ability of states to adopt immediate, temporary decisions by permitting the states to set proxy prices within a defined range or subject to a ceiling. We believe that some states will find these alternatives useful in light of the strict deadlines of the law. For example, section 252(b)(4)(C) requires a state commission to complete the arbitration of issues that have been referred to it, pursuant to section 252(b)(1), within nine months after the incumbent local exchange carrier received the request for negotiation. Selection of the actual prices within the range or subject to the ceiling will be for the state commission to determine. Some states may use proxies

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[14] Joint Explanatory Statement at 1.

temporarily because they lack the resources necessary to review cost studies in rulemakings or arbitrations. Other states may lack adequate resources to complete such tasks before the expiration of the arbitration deadline. However, we encourage all states to complete the necessary work within the statutory deadline. Our expectation is that the bulk of interconnection arrangements will be concluded through arbitration or agreement, by the beginning of 1997. Not until then will we be able to determine more precisely the impact of this Order on promoting competition. Between now and then, we are eager to continue our work with the states. In this period, as set forth earlier, we should be able to take major steps toward implementing a new universal service system and far-reaching reform of interstate access. These reforms will reflect intensive dialogue between us and the states.

23. Similarly, as states implement the rules that we adopt in this order as well as their own decisions, they may find it useful to consult with us, either formally or informally, regarding particular aspects of these rules. We encourage and invite such inquiries because we believe that such consultations are likely to provide greater certainty to the states as they apply our rules to specific arbitration issues and possibly to reduce the burden of expensive judicial proceedings on states. A variety of formal and informal procedures exist under our rules for such consultations, and we may find it helpful to fashion others as we gain additional experience under the 1996 Act.

F. Executive Summary

1. Scope of Authority of the FCC and State Commissions

24. The Commission concludes that sections 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements. The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established

in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues. In the Report and Order, the Commission concludes that the states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition throughout the country, and that under this partnership, the FCC establishes uniform national rules for some issues, the states, and in some instances the FCC, administer these rules, and the states adopt additional rules that are critical to promoting local telephone competition. The rules that the FCC establishes in this Report and Order are minimum requirements upon which the states may build. The Commission also intends to review and amend the rules it adopts in this Report and Order to take into account competitive developments, states' experiences, and technological changes.

2. Duty to Negotiate in Good Faith

25. In the Report and Order, the Commission establishes some national rules regarding the duty to negotiate in good faith, but concludes that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. The Commission also concludes that, in many instances, whether a party has negotiated in good faith will need to be decided on a case-by-case basis, in light of the particular circumstances. The Commission notes that the arbitration process set forth in section 252 provides one remedy for failing to negotiate in good faith. The Commission also concludes that agreements that were negotiated before the 1996 Act was enacted, including agreements between neighboring LECs, must be filed for review by the state commission pursuant to section 252(a). If the state commission approves such agreements, the terms of those agreements must be made available to requesting telecommunications carriers in accordance with section 252(i).

3. Interconnection

26. Section 251(c)(2) requires incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point. The interconnection must be at least equal in quality to that provided by the incumbent LEC to itself or its affiliates, and must be provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The Commission concludes that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. The Commission identifies a minimum set of five "technically feasible" points at which incumbent LECs must provide interconnection: (1) the line side of a local switch (for example, at the main distribution frame); (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signalling facilities, such as signalling transfer points, necessary to exchange traffic and access call-related databases. In addition, the points of access to unbundled elements (discussed below) are also technically feasible points of interconnection. The Commission finds that telecommunications carriers may request interconnection under section 251(c)(2) to provide telephone exchange or exchange access service, or both. If the request is for such purpose, the incumbent LEC must provide interconnection in accordance with section 251(c)(2) and the Commission's rules thereunder to any telecommunications carrier, including interexchange carriers and commercial mobile radio service (CMRS) providers.

4. Access to Unbundled Elements

27. Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. In the Report

and Order, the Commission identifies a minimum set of network elements that incumbent LECs must provide under this section. States may require incumbent LECs to provide additional network elements on an unbundled basis. The minimum set of network elements the Commission identifies are: local loops, local and tandem switches (including all vertical switching features provided by such switches), interoffice transmission facilities, network interface devices, signalling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities. The Commission concludes that incumbent LECs must provide nondiscriminatory access to operations support systems functions by January 1, 1997. The Commission concludes that access to such operations support systems is critical to affording new entrants a meaningful opportunity to compete with incumbent LECs. The Commission also concludes that incumbent LECs are required to provide access to network elements in a manner that allows requesting carriers to combine such elements as they choose, and that incumbent LECs may not impose restrictions upon the uses to which requesting carriers put such network elements.

5. Methods of Obtaining Interconnection and Access to Unbundled Elements

28. Section 251(c)(6) requires incumbent LECs to provide physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises, except that the incumbent LEC may provide virtual collocation if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. The Commission concludes that incumbent LECs are required to provide for any technically feasible method of interconnection or access requested by a telecommunications carrier, including physical collocation, virtual collocation, and interconnection at meet points. The Commission adopts,

with certain modifications, some of the physical and virtual collocation requirements it adopted earlier in the Expanded Interconnection proceeding. The Commission also establishes rules interpreting the requirements of section 251(c)(6).

6. Pricing Methodologies

29. The 1996 Act requires the states to set prices for interconnection and unbundled elements that are cost-based, nondiscriminatory, and may include a reasonable profit. To help the states accomplish this, the Commission concludes that the state commissions should set arbitrated rates for interconnection and access to unbundled elements pursuant a forward-looking economic cost pricing methodology. The Commission concludes that the prices that new entrants pay for interconnection and unbundled elements should be based on the local telephone companies Total Service Long Run Incremental Cost of a particular network element, which the Commission calls "Total Element Long-Run Incremental Cost" (TELRIC), plus a reasonable share of forward-looking joint and common costs. States will determine, among other things, the appropriate risk-adjusted cost of capital and depreciation rates. For states that are unable to conduct a cost study and apply an economic costing methodology within the statutory time frame for arbitrating interconnection disputes, the Commission establishes default ceilings and ranges for the states to apply, on an interim basis, to interconnection arrangements. The Commission establishes a default range of 0.2-0.4 cents per minute for switching. For tandem switching, the Commission establishes a default ceiling of 0.15 cents per minute. The Order also establishes default ceilings for the other unbundled network elements.

7. Access Charges for Unbundled Switching

30. Nothing in this Report and Order alters the collection of access charges paid by an interexchange carrier under Part 69 of the Commission's rules, when the incumbent LEC

provides exchange access service to an interexchange carrier, either directly or through service resale. Because access charges are not included in the cost-based prices for unbundled network elements, and because certain portions of access charges currently support the provision of universal service, until the access charge reform and universal service proceedings have been completed, the Commission continues to provide for a certain portion of access charge recovery with respect to use of an incumbent LEC's unbundled switching element, for a defined period of time. This will minimize the possibility that the incumbent LEC will be able to "double recover," through access charges, the facility costs that new entrants have already paid to purchase unbundled elements, while preserving the status quo with respect to subsidy payments. Incumbent LECs will recover from interconnecting carriers the carrier common line charge and a charge equal to 75% of the transport interconnection charge for all interstate minutes traversing the incumbent LECs local switches for which the interconnecting carriers pay unbundled network element charges. This aspect of the Order expires at the earliest of: 1) June 30, 1997; 2) the effective date of final decisions by the Commission in the universal service and access reform proceedings; or 3) if the incumbent LEC is a Bell Operating Company (BOC), the date on which that BOC is authorized under section 271 of the Act to provide in-region interLATA service, for any given state.

31. For a similar limited period, incumbent LECs may charge the same portions of any intrastate access charges comparable to the carrier common line charge (CCLC) and the transport interconnection charge (TIC), as well as any existing explicit universal service support mechanisms based on intrastate access charges. During this period, incumbent LECs may continue to recover such revenues from purchasers of unbundled local switching elements that use those elements to originate or terminate intrastate toll calls

for end user customers they win from incumbent LECs. These state mechanisms must end on the earlier of: (1) June 30, 1997; (2) the effective date of a state commission decision that an incumbent LEC may not assess such charges; and (3) if the incumbent LEC that receives the access charge revenues is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer in-region interLATA service. The last end date will apply only to the recovery of charges in those states in which the BOC is authorized to offer interLATA service.

8. Resale

32. The 1996 Act requires all incumbent LECs to offer for resale any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks. State commissions must identify marketing, billing, collection, and other costs that will be avoided or that are avoidable by incumbent LECs when they provide services wholesale, and calculate the portion of the retail rates for those services that is attributable to the avoided and avoidable costs. The Commission identifies certain avoided costs, and the application of this definition is left to the states. If a state elects not to implement the methodology, it may elect, on an interim basis, a discount rate from within a default range of discount rates established by the Commission. The Commission establishes a default discount range of 17-25% off retail prices, leaving the states to set the specific rate within that range, in the exercise of their discretion.

9. Requesting Telecommunications Carriers

33. The Commission concludes that, to the extent that a carrier is engaged in providing for a fee local, interexchange, or international basic services directly to the public or to such classes of users as to be effectively available directly to the public, the carrier is a "telecommunications carrier," and is thus subject to the requirements of section 251(a) and the benefits of section 251(c). The Commission concludes that CMRS providers are telecommunications carriers, and that private mobile radio service (PMRS) providers generally are not telecommunications carriers, except to the extent that a PMRS provider uses excess capacity to provide local, interexchange, or international services for a fee directly to the public. The Commission also concludes that, if a company provides both telecommunications services and information services, it must be classified as a telecommunications carrier.

10. Commercial Mobile Radio Service

34. The Commission concludes that LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2) to enter into reciprocal compensation arrangements with CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks. The Commission concludes that many CMRS providers (specifically cellular, broadband PCS and covered specialized mobile radio (SMR) providers) offer telephone exchange service and exchange access, and that incumbent LECs therefore must make interconnection available to these CMRS providers in conformity with sections 251(c) and 252. The Commission concludes that CMRS providers should not be classified as LECs at this time. The Commission also concludes that it may apply section 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, the Commission is not finding that section 332 jurisdiction over interconnection has been repealed by implication, and the Commission acknowledges that section 332, in tandem with

section 201, is a basis for jurisdiction over LEC-CMRS interconnection.

11. Transport and Termination

35. The 1996 Act requires that charges for transport and termination of traffic set based on "additional cost." The Commission concludes that state commissions, during arbitrations, should set symmetrical prices based on the local telephone company's forward-looking economic costs. The state commissions would use the TELRIC methodology when establishing rates for transport and termination. The Commission establishes a default range of 0.2-0.4 cents per minute for end office termination for states which have not conducted a TELRIC cost study. The Commission finds significant evidence in the record in support of the lower end of the range. In addition, the Commission finds that additional reciprocal charges could apply to termination through a tandem switch. The default ceiling for tandem switching is 0.15 cents per minute, plus applicable charges for transport from the tandem switch to the end office. Each state opting for the default approach for a limited period of time, may select a rate within that range.

12. Access to Rights of Way

36. The Commission amends its rules to implement the pole attachment provisions of the 1996 Act. Specifically, the Commission establishes procedures for nondiscriminatory access by cable television systems and telecommunications carriers to poles, ducts, conduits, and rights-of-way owned by utilities or LECs. The Order includes several specific rules as well as a number of more general guidelines designed to facilitate the negotiation and mutual performance of fair, pro-competitive access agreements without the need for regulatory intervention. Additionally, an expedited dispute resolution is provided when good faith negotiations fail, as are requirements concerning modifications to poles,

ducts, conduits, and rights-of-way and the allocation of the costs of such modifications.

13. Obligations Imposed on non-incumbent LECs

37. The Commission concludes that states generally may not impose on non-incumbent LECs the obligations set forth in section 251(c) entitled, "Additional Obligations on Incumbent Local Exchange Carriers." Section 251(h)(2) sets forth a process by which the Commission may decide to treat LECs as incumbent LECs, and state commissions or other interested parties may ask the Commission to issue a rule, in accordance with section 251(h)(2), providing for the treatment of a LEC as an incumbent LEC. In addition to this Report and Order, the Commission addresses in separate proceedings some of the obligations, such as dialing parity and number portability, that section 251(b) imposes on all LECs.

14. Exemptions, Suspensions, and Modifications of Section 251 Requirements

38. Section 251(f)(1) provides for exemption from the requirements in section 251(c) for rural telephone companies (as defined by the 1996 Act) under certain circumstances. Section 251(f)(2) permits LECs with fewer than 2 percent of the nation's subscriber lines to petition for suspension or modification of the requirements in sections 251(b) or (c). In the Report and Order, the Commission establishes a very limited set of rules interpreting the requirements of section 251(f). For example, the Commission finds that LECs bear the burden of proving to the state commission that a suspension or modification of the requirements of section 251(b) or (c) is justified. Rural LECs bear the burden of proving that continued exemption of the requirements of section 251(c) is justified, once a bona fide request has been made by a carrier under section 251. The Commission also concludes that only LECs that, at the holding company level, have fewer than 2 percent of the nation's subscriber lines are

entitled to petition for suspension or modification of requirements under section 251(f)(2). For the most part, however, the states will interpret the provisions of section 251(f) through rulemaking and adjudicative proceedings, and will be responsible for determining whether a LEC in a particular instance is entitled to exemption, suspension, or modification of section 251 requirements.

15. Commission Responsibilities Under Section 252

39. Section 252(e)(5) requires the Commission to assume the state's responsibilities under section 252 if the state "fails to act to carry out its responsibility" under that section. In the Report and Order, the Commission adopts a minimum set of rules that will provide notice of the standards and procedures that the Commission will use if it has to assume the responsibility of a state commission under section 252(e)(5). The Commission concludes that, if it arbitrates agreements, it will use a "final offer" arbitration method, under which each party to the arbitration proposes its best and final offer, and the arbitrator chooses among the proposals. The arbitrator could choose a proposal in its entirety, or could choose different parties' proposals on an issue-by-issue basis. In addition, the parties could continue to negotiate an agreement after they submit their proposals and before the arbitrator makes a decision.

40. Section 252(i) of the 1996 Act requires that incumbent LECs make available to any requesting telecommunications carrier any individual interconnection, service, or network element on the same terms and conditions as contained in any agreement approved under Section 252 to which they are a party. The Commission concludes that section 252(i) entitles all carriers with interconnection agreements to "most favored nation" status regardless of whether such a clause is in their agreement. Carriers may obtain any individual interconnection, service, or network element under the same terms and conditions as contained in any publicly filed

interconnection agreement without having to agree to the entire agreement. Additionally, carriers seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but instead may obtain access to agreement provisions on an expedited basis.

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XII. EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS OF SECTION 251 REQUIREMENTS

A. BACKGROUND

1249. Section 251(f)(1) grants rural telephone companies an exemption from section 251(c), until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state commission determines that the exemption should be terminated.[3060] Section 251(f)(2) allows LECs with fewer than two percent of the nation's subscriber lines to petition a state commission for a suspension or modification of any requirements of sections 251(b) and (c). Section 251(f) imposes a duty on state commissions to make determinations under this section, and establishes the criteria and procedures for the state commissions to follow. In the NPRM, we tentatively concluded that state commissions have the sole authority to make determinations under section 251(f). In addition, we sought comment on whether we should issue guidelines to assist state commissions when they make

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[3060] A rural telephone company is defined as a local exchange carrier operating entity to the extent that such entity "(A) provides common carrier service to any local exchange carrier study area that does not include either-- (i) any incorporated place of 10,000 inhabitants or more, or any part thereof . . .; or (ii) any territory, incorporated or unincorporated, included in an urbanized area . . .; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 153(37).

determinations regarding exemptions, suspensions, or modifications under section 251(f).

1250. Although subsections (f)(1) and (f)(2) both address the circumstances under which an incumbent LEC could be relieved of duties otherwise imposed by section 251, subsection 251(f)(2) also applies to non-incumbent LECs. The standard for determining whether to exempt a carrier under subsection 251(f)(1) is different from the standard for determining whether to grant a suspension or modification under subsection (f)(2). Subsection 251(f)(1)(B) requires state commissions to determine that terminating a rural exemption is consistent with the universal service provisions of the 1996 Act.[3061] Subsection 251(f)(2)(A)(i) requires state commissions to grant a suspension or modification if it is necessary to "avoid a significant adverse economic impact on users of telecommunications services generally," and subsection 251(f)(2)(B) requires a suspension or modification to be "consistent with the public interest, convenience, and necessity."[3062] Although we address these two subsections together, we highlight instances in which we believe that differences in statutory language require different treatment by state commissions.

1251. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a

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[3061] The provision states, "the State commission shall terminate the exemption if the request . . . is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." 47 U.S.C. § 251(f)(1)(B).

[3062] 47 U.S.C. § 251(f)(2).

Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

B. NEED FOR NATIONAL RULES

1. Comments

1252. Most state commissions[3063] and some other parties[3064] assert that states should have exclusive responsibility for the guidelines and determinations made under this section. Several commenters contend that any guidelines the Commission might issue would be useless, because generalized national guidelines could not take into account the variations among states and among individual LECs.[3065] For example, the Minnesota Independent Coalition argues that the additional grant of authority to states under section

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[3063] See, e.g., Alaska Commission comments at 6; Alabama Commission comments at 33-34; California Commission comments at 46; Idaho Commission comments at 14; Illinois Commission comments at 84; Louisiana Commission comments at 22-23; Ohio Commission comments at 80; Oregon Commission comments at 31; Pennsylvania Commission comments at 42; Texas Commission comments at 34; Wyoming Commission comments at 38-39.

[3064] Ad Hoc Telecommunications Users Committee comments at 11; ALLTEL comments at 16; Citizens Utilities comments at 34; Colorado Ind. Tel. Ass'n comments at 5-6; GVNW comments at 42; GTE comments at 80; Home Tel. comments at 1; Illinois Ind. Tel. Ass'n comments at 7; Minnesota Ind. Coalition comments at 14; Ohio Consumers' Counsel reply at 25-26; PacTel comments at 99; Puerto Rico Tel. reply at 16-17; Rural Tel. Coalition comments at 11-15.

[3065] Minnesota Ind. Coalition comments at 14; Western Alliance comments at 7.

214(e) confirms that state commissions have the sole authority to make determinations under section 251(f).[3066] A number of small telephone companies and associations of LECs advocate mandatory national rules regarding implementation of section 251(f). They assert that such rules would ensure that states carry out this provision in accordance with congressional intent.[3067] Some commenters favor a middle ground, claiming that non-mandatory guidelines from the Commission would be helpful, but that mandatory requirements would conflict with the Act's delegation to the states to make determinations under section 251(f).[3068]

2. Discussion

1253. We agree with parties, including small incumbent LECs, who argue that determining whether a telephone company is entitled, pursuant to section 251(f), to exemption, suspension, or modification of the requirements of section 251 generally should be left to state commissions.[3069] Requests made pursuant to section 251(f)

[3066] Minnesota Ind. Coalition comments at 14.

[3067] Anchorage Tel. Utility comments at 2-4; Bay Springs, et al. comments at 10; Centennial Cellular Corp. comments at 12; Alaska Tel. Ass'n comments at 6; Matanuska Tel. Ass'n comments at 5; USTA comments at 87-93.

[3068] Kentucky Commission comments at 7; Anchorage Tel. Utility comments at 4. Several parties argue that any federal action should not be mandatory. Ohio Commission comments at 80; Citizens Utilities comments at 33; Colorado Ind. Tel. Ass'n comments at 6; Rural Tel. Coalition reply at 18-19.

[3069] See, e.g., Minnesota Ind. Coalition comments at 14; Rural Tel. Coalition comments at 11.

seek to carve out exceptions to application of the section 251 rules that we are establishing in this proceeding. We find that Congress intended the section 251 requirements, and the Commission's implementing rules thereunder, to apply to all carriers throughout the country, except in the circumstances delineated in the statute. We find convincing assertions that it would be an overwhelming task at this time for the Commission to try to anticipate and establish national rules for determining when our generally-applicable rules should not be imposed upon carriers. Therefore, we establish in this Order a very limited set of rules that will assist states in their application of the provisions in section 251(f).

1254. Many parties have proposed varying interpretations of the provisions in section 251(f), and have asked for Commission determination or a statement of agreement. Because it appears that many parties welcome some guidance from the Commission, we briefly set forth our interpretation of certain provisions of section 251(f). Such statements will assist parties and, in particular, state commissions that must make determinations regarding requests for exemption, suspension, and modification.

C. APPLICATION OF SECTION 251(f)

1. Comments

1255. Some commenters urge the Commission to require states to grant exemptions, suspensions, or modifications only on a case-by-case basis, and only to the extent warranted by the particular circumstances. They ask the Commission to prohibit states from granting broad-scale or generalized exemptions, suspensions or modifications.[3070] AT&T argues that, to ensure that states do not allow LECs to avoid the regulatory and policy framework that Congress has

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[3070] See, e.g., Centennial Cellular Corp. comments at 16; NCTA comments at 64; Vanguard reply at 21-22.

mandated, the Commission should clarify that states must narrowly tailor suspensions and modifications to protect against specific, identifiable harm.[3071] Telecommunications Carriers for Competition and GCI argue that section 251(f) allows states to delay imposing the requirements under section 251(b) and (c), but it does not allow states to protect LECs from those requirements indefinitely.[3072] In response, Rural Tel. Coalition and SNET state that, while the term "suspensions" could be interpreted as allowing a time delay in implementation, the addition of the term "modifications" allows states to act more broadly.[3073] SNET favors allowing the states "broad discretion to change the nature of any requirement imposed by subsections (b) and (c)."[3074] USTA argues that states should not be permitted to eliminate all exemptions for all carriers.[3075]

1256. A number of parties allege that the Commission should encourage or require states to establish a legal presumption that the LEC seeking an exemption, suspension, or modification must prove to the state commission that such request is merited under the criteria set forth in section 251(f). AT&T argues that a carrier petitioning for suspension or modification under section 251(f)(2) should be obliged to demonstrate that "the application to it of the section 251(b)

[3071] AT&T comments at 90-93; accord Ohio Consumers' Counsel reply at 26.

[3072] GCI comments at 16-19; TCC comments at 51-53, reply at 28.

[3073] Rural Tel. Coalition reply at 19-20; SNET comments at 36-37.

[3074] SNET comments at 36-37.

[3075] USTA comments at 87; Continental comments at 17 (citing actions of New Hampshire and Connecticut Commissions); Rural Tel. Coalition reply at 25.

or (c) obligations that are the subject of its petition would inflict substantial harm on the LEC and customers in its territories that would not be inflicted on larger LECs and customers in their territories."[3076] SCBA asserts that the burden should be upon the incumbent LEC, which has strong disincentives to promote competitive entry.[3077] Local exchange carriers contend, on the other hand, that the party making a request under section 251(b) or (c) should have to prove that an exemption, suspension, or modification is not justified. For example, TCA, Inc. argues that, because of the high cost of providing telephone service in rural areas, competing carriers should be required to prove that competition will benefit a given rural area.[3078] Bay Springs, et al. and Bogue, Kansas argue that rural carriers should benefit from a presumption that they continue to qualify for the exemption in section 251(f)(1).[3079] SNET suggests that, if a LEC makes a prima facie case in its petition for suspension or modification, the state should automatically grant a temporary suspension of section 251(b) and (c) obligations, as allowed by section 251(f)(2).[3080]

1257. USTA, some rural LECs, and several other parties advocate that the Commission clarify what constitutes a bona

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[3076] AT&T comments at 92-93; contra Cincinnati Bell reply at 14; PacTel reply at 41; SNET reply at 8; USTA reply at 35-36.

[3077] SCBA comments at 17.

[3078] TCA comments at 10.

[3079] Bay Springs, et al. comments at 11; Bogue, Kansas comments at 8; contra Classic Tel. reply at 9.

[3080] SNET comments at 37; see also Anchorage Tel. Utility comments at 3-4; Cincinnati Bell comments at 41-42; USTA comments at 91-93.

fide request under section 251(f)(1).[3081] USTA recommends that a bona fide request must include, at a minimum: (1) a request for service to begin within one year from the date of the request, with a minimum one-year service period; (2) identification of the points where interconnection is sought, specification of network components and quantities needed, and the date when interconnection is desired; and (3) an indication that the requesting carrier is willing to agree to pay charges sufficient to compensate the LEC for all costs incurred in fulfilling the terms of the interconnection agreement as part of the agreement. USTA also contends that the states should be allowed to mandate longer minimum service periods and require competitive providers to post bonds or submit deposits to ensure that a rural telephone company does not bear the cost of interconnection.[3082] Anchorage Telephone Utility claims that simply responding to requests for interconnection imposes a tremendous burden and expense on rural telephone companies, and that rural LECs should not have to respond to requests that do not meet minimum criteria.[3083] Several parties state that they do not

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[3081] Anchorage Tel. Utility comments at 5; Bay Springs, et al. at 10; Bogue, Kansas comments at 7; NECA comments at 12; TDS reply at 5-6; USTA comments at 87-88; see also Kentucky Commission comments at 7.

[3082] USTA comments at 87-88; accord Anchorage Tel. Utility comments at 6-7 (carriers that ultimately do not order the items identified in a request for interconnection, services, or network elements should be required to reimburse the incumbent LEC for the costs of responding to such request); Matanuska Tel. Ass'n comments at 5.

[3083] Anchorage Tel. Utility comments at 6 (reporting the receipt of two letters "purporting to request interconnection." "One is a 1-page letter that simply asserts a need for interconnection. The other is an 8-page, single-

believe that generalized form letter requests should be considered a bona fide request.[3084]

1258. Other commenters either favor a broader definition of a bona fide request or oppose federal standards entirely.[3085] NCTA and GCI argue that a request for interconnection should be presumed bona fide until a rural telephone company shows that it is not. They object to a bona fide request requirement, such as the one proposed by USTA, that includes burdensome "pre-filing" requirements as a condition for state review under section 251(f).[3086]

1259. Subsection 251(f)(2) applies to LECs "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide."[3087] Several parties suggest that the Commission clarify which carriers meet the numerical

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spaced letter that demands detailed technical, operational and cost information on practically every facet of Anchorage Tel. Utility's local exchange service, without providing any indication of what the requesting carrier actually plans, needs or wants"); accord NECA reply at 10-11 (any bona fide request standard should permit LECs to recover costs of responding to requests and enable LECs to avoid unnecessary costs in responding to requests); TDS reply at 5-6.

[3084] TDS reply at 5; Anchorage Tel. Utility comments at 6; Rural Tel. Coalition reply at 24-25.

[3085] See, e.g., Louisiana Commission comments at 22-23 (opposing any attempt by the Commission to define a standard for bona fide requests); see also Western Alliance comments at 7 n.16.

[3086] NCTA comments at 26-27; GCI reply at 17-18; but see USTA reply at 37 (disagreeing that its proposal would constitute "pre-filing" requirements).

[3087] 47 U.S.C. § 251(f)(2).

standard.[3088] AT&T and a number of other parties argue that the 2 percent should be applied at the holding company level in order to ensure that no BOC operating company can apply for a suspension or modification under this subsection.[3089] Some parties further question whether Tier 1 LECs should be allowed to petition for suspension or modification under subsection (f)(2).[3090] Other parties argue that the two percent statutory cut-off is not a loophole and that the statutory standard should not be altered by the Commission to exclude Tier 1 LECs.[3091] PacTel suggests that the standard should be applied at the operating company level because section 251(f)(2) by its terms applies to "local exchange carrier[s]" not local exchange carriers "and their affiliates."[3092]

1260. Some parties recommend that the Commission offer guidance on how to determine whether a request for exemption, modification, or suspension should be

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[3088] BellSouth comments at 76; Ohio Consumers' Counsel comments at 47-48.

[3089] AT&T comments at 90-93; Lincoln Tel. reply at 9-10; GCI reply at 17; TCC reply at 28; Ohio Consumers' Counsel argues that this interpretation is sound because section 251(f)(2) discusses the number of lines "in the aggregate nationwide," and individual operating companies do not operate on a nationwide scale. Ohio Consumers' Counsel reply at 26.

[3090] AT&T comments at 92; TLD comments at 6-7; Centennial Cellular Corp. comments at 12-15.

[3091] Alaska Tel. Ass'n comments at 6; Cincinnati Bell comments at 40, reply at 13; Lincoln Tel. comments at 10-11.

[3092] PacTel reply at 40-41.

granted.[3093] For example, sections 251(f)(1) and (f)(2) both include consideration of "technical feasibility" in deciding whether to grant an exemption, suspension, or modification. Some parties urge the Commission to clarify whether the standard for determining technical feasibility for purposes of section 251(f) is different than the technical feasibility standard set forth in sections 251(b) and (c).[3094] Sections 251(f)(1) and (f)(2) require the states to consider whether a request is "unduly economically burdensome."[3095] Generally, comments from rural LECs and others contend that smaller LECs cannot afford to hire staff to respond to requests, or expend funds for additional facilities or operational systems without jeopardizing their financial stability.[3096] In contrast, other parties argue that LECs should not be relieved of any duties otherwise imposed by sections

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[3093] See, e.g., NCTA comments at 63-67 (urging a very limited construction of the exemption, suspension and modification provisions); contra Western Alliance reply at 7; Rural Tel. Coalition reply at 21-22.

[3094] See, e.g., Bay Springs, et al. comments at 11; Lincoln Tel. comments at 23-24; SNET comments at 35; USTA comments at 92; Rural Tel. Coalition reply at 22-23.

[3095] 47 U.S.C. § 251(f).

[3096] A number of parties argue that, if smaller and rural LECs cannot recover their total costs, including any required investments and costs associated with developing rate levels and modifying support systems, the request should be deemed unduly economically burdensome. See, e.g., USTA comments at 92; SNET comments at 36; TLD comments at 2; Lincoln Tel. comments at 23-25; TLD comments at 11-13.

251(b) and (c) merely because they would require the expenditure of funds.[3097]

1261. Some incumbent LECs recommend that carriers that compete with rural LECs should be required to assume some of the universal service obligations of rural carriers.[3098] They argue that, without such safeguards, competing LECs will enter rural markets and take the incumbent LECs' profitable customers. USTA argues that state commissions should be encouraged to grant waivers until universal service issues are resolved.[3099] Commenters also propose varying interpretations of what constitutes "significant adverse impact on users."[3100] USTA proposes that the definition include any request that would cause a LEC to "have difficulty raising sufficient investment capital, and where the remaining customers . . . would likely bear an increase in rates or a reduction in service to cover a shortfall or subsidy to a new entrant."[3101] TLD proposes that the Commission establish a numerical benchmark, for example, that more than 50 percent of the users would suffer a rate increase of at least 20 percent before a request would be considered in violation of subsection (f)(2)(A)(i).[3102]

3. Discussion

1262. Congress generally intended the requirements in section 251 to apply to carriers across the country, but Congress recognized that in some cases, it might be unfair or

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[3097] See, e.g., NCTA comments at 64 n.218.

[3098] Bay Springs, et al. comments at 12; TLD comments at 5; accord NECA comments at 11.

[3099] USTA comments at 91; but see NCTA reply at 25-26.

[3100] 47 U.S.C. § 251(f)(2)(A)(i).

[3101] USTA comments at 92.

[3102] TLD comments at 11.

inappropriate to apply all of the requirements to smaller or rural telephone companies.[3103] We believe that Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption, suspension, or modification. We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service. Thus, we believe that, in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission's section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry. State commissions will need to decide on a case-by-case basis whether such a showing has been made.

1263. Given the pro-competitive focus of the 1996 Act, we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona-fide request has been made, and that smaller companies must prove to the state commission, pursuant to section 251(f)(2), that a suspension or modification of requirements of sections 251(b) or (c) should be granted. We conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request. A rural company that falls within section 251(f)(1) is not required to make any showing until it receives a bona fide request for

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[3103] 47 U.S.C. § 251(f).

interconnection, services, or network elements. We decline at this time to establish guidelines regarding what constitutes a bona fide request. We also decline in this Report and Order to adopt national rules or guidelines regarding other aspects of section 251(f). For example, we will not rule in this proceeding on the universal service duties of requesting carriers that seek to compete with rural LECs. We may offer guidance on these matters at a later date, if we believe it is necessary and appropriate.

1264. We find that Congress intended section 251(f)(2) only to apply to companies that, at the holding company level, have fewer than two percent of subscriber lines nationwide. This is consistent with the fact that the standard is based on the percent of subscriber lines that a carrier has "in the aggregate nationwide."[3104] Moreover, any other interpretation would permit almost any company, including Bell Atlantic, Ameritech, and GTE affiliates, to take advantage of the suspension and modification provisions in section 251(f)(2). Such a conclusion would render the two percent limitation virtually meaningless.

1265. We note that some parties recommend that, in adopting rules pursuant to section 251, the Commission provide different treatment or impose different obligations on smaller or rural carriers.[3105] We conclude that section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified in particular instances. We conclude that there is no basis in the record for

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[3104] 47 U.S.C. 251(f)(2) (emphasis added).

[3105] For example, the Rural Tel. Coalition argues that interconnection and collocation points should be set in a flexible manner to take into account size and volume differences among carriers. Rural Tel. Coalition comments at 31.

adopting other special rules, or limiting the application of our rules to smaller or rural LECs.

XIII. ADVANCED TELECOMMUNICATIONS CAPABILITIES

1266. Section 706(a) provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[3106] In the NPRM, we sought comment on how we can advance Congress's section 706(a) goal within the context of our implementation of sections 251 and 252.[3107]

1267. A number of parties suggest that rules allowing them to compete effectively and earn a profit in the telecommunications industry would assist the industry in providing telecommunications services to all Americans.[3108] MFS suggests that "all LECs should be required, as a condition of eligibility for universal service subsidies, to meet network modernization standards for rural telephone companies."[3109] Several state commissions indicate that they have already established programs to assist institutions eligible under section 706 in deploying advanced

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[3106] 47 U.S.C. § 706(a).

[3107] NPRM at para. 263.

[3108] Colorado Ind. Tel. Ass'n comments at 6; COMAV comments at 60-61; GVNW comments at 42; Illinois Ind. Tel. Ass'n comments at 7; Louisiana Commission comments at 24-27.

[3109] MFS comments at 88.

telecommunications services.[3110] The Alliance for Public Technology asserts that section 706 should underlie all of the FCC's proceedings.[3111] Ericsson states that the industry should work with government agencies to promote leading edge technology to ensure that it is introduced on a reasonably timely basis. For example, it contends that "Plug and Play Internet use" will greatly help the public and schools access information, and that advanced technology such as asynchronous transfer mode (ATM), wireless data/video, and AIN will enhance interconnection capabilities of public and private networks.[3112] The Illinois Commission contends that, depending on the pricing standard the Commission adopts for interconnection and access to unbundled elements, and the Commission's interpretation of the prohibition against discrimination, the Commission should adopt special rules for carriers when they provide interconnection or access to unbundled network elements to serve a school, library, or healthcare provider.[3113]

1268. We decline to adopt rules regarding section 706 in this proceeding. We intend to address issues related to section 706 in a separate proceeding.

XIV. PROVISIONS OF SECTION 252

A. Section 252(e)(5)

1. Background

1269. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state

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[3110] Illinois Commission comments at 85; Louisiana Commission comments at 24-27; Texas Commission comments at 36.

[3111] Alliance for Public Technology reply at 1-5.

[3112] Ericsson comments at 7-8.

[3113] Illinois Commission comments at 86.

commission "fails to act to carry out its responsibility" under section 252.[3114] In the NPRM, we asked whether the Commission should establish rules and regulations necessary to carry out our obligation under section 252(e)(5).[3115] In addition, we sought comment on whether in this proceeding we should establish regulations necessary and appropriate to carry out our obligations under section 252(e)(5). In particular, we sought comment on what constitutes notice of failure to act, what procedures, if any, we should establish for parties to notify the Commission, and what are the circumstances under which a state commission should be deemed to have "failed to act" under section 252(e)(5).[3116]

1270. Section 252(e)(4) provides that, if the state commission does not approve or reject (1) a negotiated agreement within 90 days, or (2) an arbitrated agreement within 30 days, from the time the agreement is submitted by the parties, the agreement shall be "deemed approved."[3117] We sought comment on the relationship between this provision and our obligation to assume responsibility under section 252(e)(5). We also sought comment on whether the Commission, once it assumes the responsibility of the state commission, is bound by all of the laws and standards that would have applied to the state commission, and whether the Commission is authorized to determine whether an agreement is consistent with applicable state law as the state commission would have been under section 252(e)(3).[3118] In addition, we sought comment on whether, once the Commission assumes responsibility under section 252(e)(5),

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[3114] 47 U.S.C. § 252(e)(5).

[3115] NPRM at P 265.

[3116] NPRM at P 266.

[3117] 47 U.S.C. § 252(e)(4).

[3118] NPRM at P 267.

it retains jurisdiction, or whether that matter or proceeding subsequently should be remanded to the state.

1271. Finally, we sought comment on whether we should adopt, in this proceeding, some standards or methods for arbitrating disputes in the event we must conduct an arbitration under section 252(e)(5). We noted some of the benefits and drawbacks of both "final offer" arbitration and open-ended arbitration, and asked for comment on both.

2. Comments

1272. The majority of the parties that commented on this issue assert that the Commission should establish guidelines under which it will carry out its responsibilities under section section 252(e)(5).[3119] The Illinois Commission, for example, argues that regulations are needed in order to avoid jurisdictional disputes that may arise.[3120] Some parties, on the other hand, argue that it is not critical for the Commission at this time to develop rules governing the arbitration process.[3121] The Pennsylvania Commission, for example, argues that such rules should be adopted in this proceeding only if the Commission perceives a real possibility that it will be asked in the near future to arbitrate an interconnection agreement.[3122]

[3119] See, e.g., Jones Intercable comments at 16-18; California Commission comments at 49; Illinois Commission comments at 87; MCI comments at 94-95; BellSouth comments at 78; Cable & Wireless comments at 50-51; Time Warner comments at 104-105; Oregon Commission comments at 4.

[3120] Illinois Commission comments at 87.

[3121] See, e.g., Pennsylvania Commission comments at 42; PacTel comments at 99; Iowa Commission comments at 7; GTE comments at 80-81.

[3122] Pennsylvania Commission comments at 42.

1273. A broad range of parties comment on what constitutes a "failure to act" and whether the Commission should establish a definition and procedures for interested parties to notify us if a state commission fails to act.[3123] The Illinois Commission, for example, argues that, upon receipt of a petition to mediate or arbitrate, or a BOC statement of generally available terms, the state commission should issue and serve upon the Commission a notice of its intent to act. This will put the Commission and interested parties on notice that the state commission intends to act.[3124] Some state commissions argue that "failure to act" occurs only if the state commission fails to respond to a request for mediation or arbitration, or fails to issue an arbitration decision within nine months after the incumbent LEC receives a request for interconnection under section 252.[3125]

1274. Other parties contend that failure to act should mean that a state commission has not taken any steps to act upon a request for arbitration, or has not taken any steps to approve an arbitrated agreement within the time set out in section 252(e)(4).[3126] Jones argues that a failure to act occurs where

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[3123] See, e.g., Illinois Commission comments at 89; District of Columbia comments at 40; Ohio Commission comments at 81-82; Time Warner comments at 106-107; PacTel comments at 99; Jones Intercable comments at 16 (failure to act occurs where a state fails to respond to a request for arbitration or fails to render a decision on time in arbitration).

[3124] Illinois Commission comments at 89.

[3125] District of Columbia Commission comments at 40; Ohio Commission comments at 81-82; accord Cable & Wireless comments at 51.

[3126] See, e.g., Oregon Commission comments at 4; California Commission comments at 47; Ohio Consumers'

a state fails to respond to a request for arbitration or fails to render a decision on time in the arbitration proceeding.[3127] Ohio Consumers' Counsel contends that failure to carry out a state's responsibility means more than mere inaction, and that, for example, willfully disregarding the standards in section 252(e)(2) for approving or disapproving agreements might also "constitute a failure to act to carry out its responsibility" under section 252.[3128] USTA argues that, where there has been no agreement and the state fails to act, the Commission must step in and, in some instances, the Commission may need to step in to arbitrate or mediate before an agreement has been reached.[3129]

1275. Regarding the relationship between sections 252(e)(5) and 252(e)(4), most commenters assert that, if a state fails to approve a negotiated agreement within 90 days, or an arbitrated agreement within 30 days, the agreement will be deemed approved, and no Commission action is required.[3130] These parties contend that approval or disapproval of negotiated or arbitrated agreements are not reviewable by the

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Counsel comments at 49; Texas Commission comments at 36-37.

[3127] Jones Intercable comments at 16.

[3128] Ohio Consumers' Counsel comments at 49; see also California Commission comments at 48 (an agreement automatically approved because the state did not act within the specified time frame should not be deemed to be in compliance with state law).

[3129] USTA comments at 93-94.

[3130] See, e.g., USTA comments at 93-94; Illinois Commission comments at 88; BellSouth comments at 79; Jones Intercable comments at 15; Time Warner reply at 106-107; PacTel comments at 99.

Commission, but that aggrieved parties may seek relief in the appropriate federal district court.

1276. A number of commenters believe that it is important that procedures be in place for interested parties to notify the Commission if a state fails to act. These parties argue that notice of failure to act should be in writing, and should contain the relevant factual circumstances including the provision of the statute under which the state allegedly has failed to act.[3131] They contend that notice should be given to allow interested parties and the state adequate time to respond. MCI asserts that existing Commission procedures are adequate. MCI argues that any notice of an alleged state commission failure to act should set forth relevant facts and the Commission should place the item on public notice.[3132]

1277. A majority of the commenting parties argue that, if the Commission assumes the responsibility of a state commission, it should be bound by laws and standards that would have applied to the state commission.[3133] These parties allege that this approach would produce consistent results, and that Congress did not intend to create another forum with a separate set of rules. Time Warner, on the other

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[3131] See, e.g., Ohio Commission comments at 81; Ohio Consumers' Counsel comments at 49; Illinois Commission comments at 89-90.

[3132] MCI comments at 95.

[3133] See, e.g., PacTel comments at 13-14 (if there is any conflict between the Commission's own rules and requirements of that state, the Commission must lay aside its rules and enforce the state's); California Commission comments at 48; Illinois Commission comments at 90; BellSouth comments at 79; Ohio Commission comments at 82; Louisiana Commission comments at 28 (specific questions concerning a state's law could be certified to the state); SBC comments at 105.

hand, argues against the Commission being bound by state law.[3134]

1278. Parties disagree over whether authority would revert back to the states once the Commission assumes a state commission's responsibility. A number of state commissions argue that the Commission does not retain jurisdiction; it only assumes jurisdiction over a particular proceeding or matter but does not substitute for the state commission on an ongoing basis.[3135] The District of Columbia Commission asserts that, at any time, the state should be able to petition the Commission to reconsider its decision to preempt, and such petitions should be granted upon a reasonable assurance the state intends to carry out its obligations.[3136] A number of parties contend that, once the Commission assumes jurisdiction over a proceeding or matter, it should retain jurisdiction.[3137] Teleport, for example, argues that the Commission "should not risk returning jurisdiction to a state that has demonstrated an ineptitude for implementing

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[3134] Time Warner comments at 107-108 (the Commission's authority to interpret state law is suspect, and the Commission lacks the resources and expertise to sit as a trier of law in fifty jurisdictions).

[3135] See, e.g., Ohio Commission comments at 81; Louisiana Commission comments at 28; Pennsylvania Commission comments at 43; District of Columbia Commission comments at 40-41; BellSouth comments at 80.

[3136] District of Columbia Commission comments at 40-41.

[3137] See, e.g., Teleport comments at 89; Jones Intercable comments at 17; Time Warner comments at 109; Oregon Commission comments at 5 (failure by the state to act on one agreement should not vest jurisdiction over other agreements or matters).

interconnection agreements."[3138] Pacific Telesis and Cable and Wireless argue that any agreement arbitrated by the Commission must be submitted to the state for approval.[3139]

The vast majority of commenters recommend that the Commission adopt standards for arbitrating disputes in the event that it assumes responsibility under section 252(e)(5).[3140] These parties assert that sufficiently detailed rules should ensure fair and expeditious handling of arbitrations. A few of the commenters favor national rules governing state arbitration proceedings.[3141] SCBA, for example, favors national standards requiring state commissions to use abbreviated, lower cost arbitration proceedings for small cable operators.[3142] The majority of commenters, however, argue against national rules that would govern state arbitration proceedings.[3143]

[3138] Teleport comments at 89.

[3139] PacTel comments at 100; Cable & Wireless comments at 52.

[3140] See, e.g., Teleport comments at 85-86; MFS comments at 89-90; CompTel comments at 108; MCI comments at 95-96; Ohio Consumers' Counsel comments at 50; SBC comments at 99; Kentucky Commission comments at 7; Ohio Commission comments at 83; Illinois Commission comments at 91; Timer Warner comments at 109; Jones Intercable comments at 18; Vanguard comments at 35-37; Association of Telemessaging Services International reply at 18.

[3141] See, e.g., Vanguard comments at 35-37; Time Warner comments at 109.

[3142] SCBA comments at 11-12.

[3143] See, e.g., Oregon Commission reply at 11; Ohio Commission comment at 81; NARUC reply at 14; Illinois Commission at 91.

APPENDIX C

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
PART II: DEVELOPMENT OF COMPETITIVE MARKETS

47 U.S.C. § 251

§ 251. Interconnection

(a) General duty of telecommunications carriers. Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers. Each local exchange carrier has the following duties:

(1) Resale. The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability. The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity. The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way. The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the

terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale. The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes. The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory,

for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation.

(1) In general.- Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards. In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration.

(1) Commission authority and jurisdiction. The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs. The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number. The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications.

(1) Exemption for certain rural telephone companies.

(A) Exemption. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not

unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule. The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption. The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers. A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such

petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements. On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until

such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier.

(1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B) (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents. The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision. Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not

later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of

providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. For the purposes of section 251(c)(4) of this title, a State

commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission.

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection. The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of

an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the

terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings. Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required. A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier. For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

47 U.S.C. § 253

§ 253. Removal of barriers to entry

(a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers. Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural Markets. It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in

a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

APPENDIX D

TITLE 47 -- TELECOMMUNICATION
CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B -- COMMON CARRIER SERVICES
PART 51 -- INTERCONNECTION
SUBPART E -- EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS OF REQUIREMENTS OF SECTION 251 OF THE ACT

47 CFR 51.401

§ 51.401 State authority.

A state commission shall determine whether a telephone company is entitled, pursuant to section 251(f) of the Act, to exemption from, or suspension or modification of, the requirements of section 251 of the Act. Such determinations shall be made on a case-by-case basis.

47 CFR 51.403

§ 51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.

A LEC is not eligible for a suspension or modification of the requirements of section 251(b) or section 251(c) of the Act pursuant to section 251(f)(2) of the Act if such LEC, at the holding company level, has two percent or more of the subscriber lines installed in the aggregate nationwide.

47 CFR 51.405

§ 51.405 Burden of proof.

(a) Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that

the rural telephone company should be entitled, pursuant to section 251(f)(1) of the Act, to continued exemption from the requirements of section 251(c) of the Act.

(b) A LEC with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide must prove to the state commission, pursuant to section 251(f)(2) of the Act, that it is entitled to a suspension or modification of the application of a requirement or requirements of section 251(b) or 251(c) of the Act.

(c) In order to justify continued exemption under section 251(f)(1) of the Act once a bona fide request has been made, an incumbent LEC must offer evidence that the application of the requirements of section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

(d) In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

APPENDIX E

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-3321

Iowa Utilities Board,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3406

National Association of Regulatory Utility Commissioners,

Petitioner,

v.

* Petition for Review of an Order of the Federal Communications Commission

Federal Communications Commission; United States of America,

Respondents

No. 96-3410

The Southern New England Telephone Company,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3414

Bell Atlantic Corporation; Bellsouth Corporation; Pacific Telesis Group,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3416

Ameritech Corporation;

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3418

US West, Inc.,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3424

GTE Service Corporation; GTE Alaska Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated, GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of California, Inc.; Contel of Minnesota, Inc.; Contel of the South, Inc.,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3430

New York Telephone Company; New England Telephone and Telegraph Company,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3436

Cincinnati Bell Telephone Company,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3444

People of the State of New York;
The Public Service Commission
of the State of New York

Petitioners,

v.

Federal Communications
Commission; United States of
America,

Respondents

No. 96-3450

SBC Communications, Inc.

Petitioner,

v.

Federal Communications
Commission; United States of
America,

Respondents

No. 96-3453

Louisiana Public Service Commission

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3460

Florida Public Service Commission,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3507

South Dakota Public Utilities Commission,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3519

The People of the State of California; The Public Utilities Commission of the State of California,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3520

United States Telephone Association

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3603

Rural Telephone Coalition,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3604

Competitive Telecommunications Association,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents

No. 96-3608

Mississippi Public Service Commission,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents

The motions of AT&T Corp; Competitive Telecommunications Association; MFS Communications Company, Inc.; AirTouch Communications, Inc.; NEXTLINK Communications; U.S. West, Inc.; Association for Local Telecommunications Services; Cox Communications, Inc.; Vanguard Cellular Systems, Inc.; Western Wireless Corporation; Cellular Telecommunications Industry Association; Sprint Corporation; Sprint Spectrum, L.P.; National Cable Television Association, Inc.; MCI Telecommunications Corporation; American Communications Services, Inc.; KMC Telecom, Inc.; Bell Atlantic Corporation; BellSouth Corporation; Pacific Telesis Group; SBC Communications, Inc.; Competition Policy Institute; Maryland Public Service Commission; ACC Corp.; GST Telecom, Inc.; General Communications, Inc.; Telecommunications Resellers Association; United States Telephone Association; Arkansas Public Service Commission; ALLTEL Telephone Services Corporation; Consumer Federation of America; Ad Hoc Telecommunications Users Committee; Ameritech Corporation; Information Technology Industry Council; Independent Telephone and Telecommunications Alliance; Western Alliance; Tele-Communications, Inc., Jones Intercable, Inc.; North State Telephone Company; Oregon Public Utility Commission; America's Carriers Telecommunication Association; Teleport Communications Group Inc.; Rural Telecommunications Group; ProNet, Inc.; WinStar Communications, Inc.; Roseville Telephone Company; Allied Associated Partners, LP; GELD Information Systems; U.S. One Communications Services; Comcast Corporation; Frontier Corporation; California Public Utilities Department; City of Long Beach, California; City of Manassas, Virginia; Concord Telephone Company; Cable & Wireless, Inc.; Rock Hill Telephone Company; Public Utilities Commission of the State of Hawaii; National

Association of State Utility Consumer Advocates; ICG Telecom Group, Inc.; American Public Communications Council, Inc.; Minnesota Public Utilities Commission; Time-Warner Communications Holdings, Inc.; Southern New England Telephone Company and Personal Communications Industry Association for leave to intervene in these cases, and any petitions for review which may be filed and consolidated with these cases, are granted.

It is further ordered that the motion of Pacific Telecom, Inc. for leave to file an amicus brief is denied. This order is without prejudice to Pacific Telecom's right to move for leave to intervene.

October 10, 1996

Ordered Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.